Supreme Court, U.S.
FILED
APR 05 1993

No. 92-1604

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SANFORD J. BERGER, et al.
Petitioners,

- vs -

CUYAHOGA COUNTY BAR ASS'N, et al.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a federal fee-shifting statute is involved in federal court litigation, is the substantive law regulating the division of a settlement fund between the successful lawyer and his client exclusively federal, so that any state regulation of the fees its licensed lawyers may receive therein constitutues an infraction of the Supremacy Clause?

2. Is there an impingement of the Supremacy Clause, as well as a denial of federal constitutional due process due to a lack of prior notice, when permissible federal court activity of a lawyer is subsequently deemed to be impermissible by state disciplinary authorities?

3. Is state regulation of its licensed lawyers preempted by federal law when such regulation substantially interferes with and impairs the carrying out of the purposes and objectives of a federal statutory scheme?

4. Is a facially conclusive claim of federal

preemption, concerning a State's attempt to intrude into the federal domain, subject to the abstention principles set down in Younger v. Harris, 401 U.S. 37 (1971)?

5. Does Middlesex Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982), require federal court abstention from granting requested declaratory and injunctive relief when the underlying proceedings involve the enforcement of federal, not state, substantive standards?

6. Do prior federal court requests for declaratory and injunctive relief from state action become moot by the state's acting without subject-matter jurisdiction and/or failing to address properly presented federal issues, and the injury to the applicant persists?

7. Does the failure of a federal court to determine requests for declaratory and injunctive relief state action, following the completion of that state action wherein the

applicant did not have a full and fair opportunity to have his federal issues heard and decided by the state, constitute the effective denial of any forum wherein the applicant could have his federal issues decided, in violation of federal due process requirements and the First Amendment right to have access to the courts?

8. Are successful lawyers, who have acted in furtherance of the interests of the United States government, entitled to absolute federal official immunity from state regulation of their actions while involved in vindicating a federal statutory scheme?

9. Do the doctrines of Res Judicata and/or Collateral Estoppel apply to state disciplinary proceedings when the complaining party waived any objections he might have had to a settlement fund division in a federal civil rights case by not presenting his objections to the federal trial judge, who presided in his case from the outset, in the first in-

stance and in a timely manner?

10. Is the defense of absolute judicial or quasi-judicial immunity available to a local, non-integrated association of private lawyers when it engages in purely administrative and/or investigative activities prior to assuming a prosecutional role in a state attorney disciplinary proceeding?

11. Can private parties claim state action immunity, as a defense to federal anti-trust claims, when the State itself had no jurisdiction that could be delegated to those private parties, or when an impermissible risk of furthering personal interests exists?

12. Should this Court exercise its supervisory powers over the lower federal courts in order to vacate a decision of a federal Circuit Court of Appeals which twice failed to consider all of the properly presented Issues, and which failed to follow standards previously set down by this Court?

13. Do the irregularities referred to in

Question 11 constitute a violation of the protected rights of these Petitioners as guaranteed to them by the First and Fifth Amendments to the Constitution of the United States?

PARTIES

From the outset of these proceedings on January 23, 1990, Sanford J. Berger and Robert M. Fertel have been the plaintiffs and appellants.

The defendants and appellees have been: The Cuyahoga County Bar Ass'n, the Grievance Committee of the Bar Ass'n, Lawrence Turbow, Investigator for the Grievance Committee of the Bar Ass'n, J. Warren Bettis, Disciplinary Counsel for The Supreme Court of Ohio, the Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio, and The Supreme Court of Ohio.

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1. The supervision of the relationship between an attorney and his client in a federal fee-shifting action must be exclusively within federal court jurisdiction so as to ensure the full enforcement of the rights protected by the federal act. 19

2. A state cannot impose disciplinary sanctions against its licensed lawyers for federal court conduct which is authorized, or has not been prohibited, by the federal court system. 24

3. State regulation of the fees an attorney may ask of his client in the settlement of a post-trial federal fee-shifting proceeding would significantly interfere with the accomplishment of the purposes and objectives of the involved federal Act by deterring competent counsel from handling such cases. 26

4. The principles of Younger abstention are not applicable when a state impermissibly intrudes into an exclusively federal domain. 31

5. The abstention principles set down in Younger and Middlesex are not furthered when the involved and underlying substantive law principles are exclusively federal. 33

6. An applicant's request for declaratory and injunctive relief from a federal court, against state court action, is not mooted

when the state court acted without jurisdiction; has failed to address properly presented federal issues, and the injury to the applicant persists. 36

7. When first state, and then federal courts fail to addresss properly presented federal issues by an applicant, then that applicant is denied the protection of the First and Fifth Amendments. 39

8. If private attorneys, who are urged by Congress to perform the duties of salaried government attorneys, are not provided with absolute federal official immunity from state regulation when performing those duties, then said state regulation is calculated to diminish the availability of competent private attorneys. 40

9. The involved federal trial judge is in the best position to determine the reasonableness of a requested fee, and a complaining party is required to file his objections with said judge, and obtain his ruling, as a condition

precedent to any subsequent complaint to state disciplinary authorities. 43

10. The common law basis for judicial or quasi-judicial immunity is not furthered by providing absolute immunity to private citizens, whose complained of actions are not intimately associated with the judicial phase of a state proceeding. 44

11. The basis for state action immunity -- federalism and state sovereignty -- are not fruthered by granting immunity to an association of private citizens when there is an impermissible risk that those citizens will further their own interests rather than the government's. 47

12. This Court, pursuant to its Rule 10.1(a) and (c), should exercise its supervisory powers to compel the U.S. Court of Appeals for the Sixth Circuit to adjudicate all unaddressed Issues in accordance with this Court's standards. 49

13. In order to assure that an appeal as of

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In The
Supreme Court of the United States

October Term, 1992

No. 92 -

SANFORD J. BERGER, et al.

Petitioners

- vs -

CUYAHOGA COUNTY BAR ASS'N, et al.

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Sixth Circuit is reported at 983 F.2d 718, and is reproduced in the Appendix at pages A1-11. The opinion of the federal district court is reported at 775 F. Supp. 1096 (ND,Ohio,ED,1991) and is repro-

duced in the Appendix at pages A12-31. The Order denying a F.R.C.P. 59(e) motion is unreported and reproduced in the Appendix at pages A32-39.

JURISDICTION

The decision of the Circuit Court of Appeals for the Sixth Circuit was issued on January 11, 1993. A timely Petition For Rehearing With Suggestions For Rehearing En Banc was denied, without Opinion, on March 12, 1993. This Court has jurisdiction under the provisions of 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners rely on the First Amendment and Fifth Amendment to, and the Supremacy Clause in Article VI of, the Constitution of the United States, which are set forth in the Appendix at A40.

The attorney's fee provision of 42 U.S.C. §1988 is argued herein, and is set forth in the Appendix at page A41.

STATEMENT OF THE CASE

A. The Petitioners

The petitioners, Sanford J. Berger and Robert M. Fertel, were licensed to practice law by the state of Ohio in 1952 and 1972 respectively, and admitted to practice in federal court in 1963 and 1974 respectively. During March, 1981, they associated, and had unblemished professional reputations until the incidents of this appeal commenced on March 7, 1989.

Their practice has centered around federal fee-shifting litigation essentially, but they were also one of the few firms in Cuyahoga County, Ohio who were willing to represent litigants aggrieved by attorney malpractice or constitutional violations. In fact, the first attorney appointed by the respondent Cuyahoga County Bar Ass'n (Bar) as an Investigator of their professional conduct was a defendant in a then-pending lawsuit. Nor were they ever members of the subject Bar.

Some of the highpoints in their practice was the decision in Sanford J. Berger v. The Supreme Court of Ohio, 598 F. Supp. 69 (SD,Ohio,1984), which favorable language therein governed all subsequent judicial campaigns in Ohio. They were also pleased with the decision in Loudermill v. Cleveland Board of Education, 721 F.2d 550 (CA6,1983), which was later affirmed by this Court, 470 U.S. 532 (1985).

Because of the many unique and unprecedented federal constitutional questions they sought to have addressed in their federal actions, they have been obliged to engage in extensive federal appellate work.

B. Petitioners' underlying federal activity that gave rise to state disciplinary charges.

As a direct consequence of their publicized success in Loudermill, a Daniel Gurish (Gurish) came to their office during Dec., 1983 with a §1983 case that had been prepared by another attorney; summary judgment had

been granted against him, and he asked if we would take an appeal to the Sixth Circuit Court of Appeals. Gurish had been a Corrections Officer who had been discharged for beating a feeble-minded inmate assigned to his care, and then covering up the beating in his Duty Report. As such, the possibilities of his succeeding at any possible future trial were exceedingly remote and speculative.

We explained to Gurish that appeals cost money; cannot be taken on a contingency basis, and that we charged $200 an hour for appellate work. Assuring us that he had resources for the cost of the appeal, we then appealed to the Sixth Circuit and the matter was reversed and remanded. Upon remand, a second summary judgment was granted against him after our lengthy and time-consuming opposition, and a second appeal had to be taken wherein we were again successful.

At that point in time, and irrespective of any trial representation, Gurish owed us

$40,000 less $2,500 he had given us. We then entered into a 50%-50% contingent fee contract with him for trial representation.

The case went to trial on 7/28/88; and after five days of trial, the jury returned a surprise verdict of $100,000. The trial court then entered its judgment for $100,000 plus reasonable attorney fees. Our filed Petition For An Award Of Attorney Fees, with supporting schedules, asked for $191,000 thereafter. After a one-day hearing before a Magistrate on 2/3/89 (wherein our Expert testified as to the reasonableness of our requested fee), the County made a package offer of $130,000 on 2/9/89 to settle both the now-appealed judgment and our attorney fee claims -- which offer was unacceptable to us, but which we were ethically obliged to convey to Gurish.

Representing that he was in dire need of money and could not wait for the appealed judgment to be decided, Gurish demanded that we immediately accept the offer on his behalf,

and it was agreed that the split would be one-half of the judgment amount ($50,000) for him and $80,000 for us to satisfy his two pre-trial appeals and trial obligations owing to us. Of course, that aborted any chance for an award of attorney fees to us by the court, and an entry was then made that the case was "Settled and dismissed."

At that point in time, we were totally satisfied that the settlement division was in complete compliance with federal standards regarding what constituted a reasonable fee under 42 U.S.C. §1988.

Between the time of our agreed-upon division of the settlement fund to the actual receipt of the funds, Gurish voiced no objection as to the division to the federal trial judge or us. However, when the funds were received and Gurish's endorsement required on a check, Gurish reneged on our agreement; demanded 50% of the total settlement fund, and when we refused to agree to his surprise

demand, we were discharged by Gurish and he obtained new counsel. As such, we retained a settlement check that Gurish refused to sign, as one of the payees thereon, so that it could be negotiated.

Gurish then filed a dubious "Motion To Cease and Desist" with the federal trial judge, who refused to intervene in the dispute, and dismissed Gurish's motion on the basis that he no longer had jurisdiction due to his having closed the case. Gurish took no appeal from that adverse ruling.

Even though the involved federal court had its own disciplinary procedures; had never adopted Ohio's Code of Professional Responsibility or delegated its exclusive disciplinary authority to the state of Ohio, Gurish chose not to file disciplinary charges against us in federal court. Rather, he opted to fle a disciplinary complaint against Berger with the respondent Bar on 3/7/89 wherein he claimed that Berger was: "Shaking

him down!" ... "Strong arming him!" and "I'm being raped by my attorney, and question whether he really has my best interest at hart [sic]."

C. The proceedings in the state of Ohio.

Thereafter, the Bar's 50 member Grievance Committee conducted an "Investigatory Hearing," and eventually they filed Disciplinary Complaints against us with the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio (Board) wherein we were charged with "charging an excessive fee," "failing to pay to a client funds which the client is entitled to receive," and two other charges. In the Bar proceedings, we raised our federal constitutional and statutory claims, but they were never responded to.

During June, 1989, Gurish then brought suit against us in state court wherein he sought declaratory relief; we raised our federal constitutional and statutory claims against the state court assuming jurisdiction

to determine what a reasonable fee should be, but all to no avail. On 5/30/90, the state trial judge persuaded Gurish and us to resolve and settle the state suit, a pending federal suit against Gurish and his new lawyer, as well as the state disciplinary proceedings, by splitting the settlement fund on a 50%-50% basis. Gurish and his lawyer were then dismissed as defendants in the federal suit; Gurish endorsed the check and received $65,000; the state suit was dismissed, and Gurish sent a letter to the Bar asking withdrawal of his disciplinary Complaint.

As a result of Gurish's letter to the Bar, the disciplinary proceedings were expanded by the Bar filing an Amended Complaint wherein a new Count was added: "Failure to assist in the investigation of a Complaint."

Separate Motions To Dismiss both the Complaint and Amended Complaint were made on the bases of lack of subject-matter jurisdiction, federal preemption, federal official

immunity, and res judicata, but those two motions were never ruled upon by the Ohio Supreme Court (as the final decision-maker), even though we made three separate requests for such a ruling.

The Board's Report and Recommendation came one year after the hearing and recommended that we be suspended for one year. We then moved the Ohio Supreme Court for an extension of time to file Additional Objections to the Report on the ground that, in order to have a meaningful opportunity to respond as required by federal constitutional due process, the short time allowed by the Ohio Supreme Court was not adequate. Our request was denied without explanation.

Shortly thereafter, we sought to present the Ohio Supreme Court with the federal standards for the determination of a reasonable attorney's fee by a Motion To File Additional Objections Instanter, and tendered those Additional Objections. That Motion was also

overruled without explanation.

As such, the Ohio Supreme Court never ruled upon its challenged subject-matter jurisdiction or the federal issues we presented for resolution. That the Ohio Supreme Court avoids addressing properly presented federal issues in a state disciplinary proceeding can be further illustrated by this language from the Petition For A Writ Of Certiorari in E.J. Leizerman v. Toledo Bar Ass'n, No. 92-1266, at page 10:

> Petitioner's federal challenges under the First and Fourteenth Amendment and the Supremacy Clause (and other arguments) were then presented to the Ohio Supreme Court. ... The Court did not discuss the claims.
>
> On September 23, 1992, respondent filed a motion for reconsideration based on the Ohio Supreme Court's failure to discuss his preemption and other constitutional challenges. A35. The motion was denied, without opinion, on October 28,1992. A15.

On September 2, 1992, the Ohio Supreme Court issued its Order suspending us from the practice of law for one (1) year plus payment of costs amounting to $2,117.92.

Our Petition For A Writ of Certiorari To The Supreme Court Of Ohio, No. 92-887, was denied by this Court on January 19, 1993.

D. The proceedings in federal court.

On January 23, 1990, during the Bar's investigation, we filed a federal civil rights action, pursuant to 42 U.S.C. §1983, against the Bar, the Ohio Supreme Court and its Board, Ohio's Disciplinary Counsel, and Gurish and his new attorney. That Complaint only requested monetary damages from the Bar defendants (and among our claims was a claim of a federal anti-trust violation), as well as Gurish and his new attorney.

In that Complaint, we also sought declaratory and injunctive relief against all of the defendants based upon lack of subject-matter jurisdiction, federal preemption, federal official immunity and res judicata.

On September 19, 1991, the federal district court granted the defendants' Motions To Dismiss, by holding that the state attor-

ney disciplinary proceedings were not pre-empted by the federal Civil Rights Act; that it was required to abstain pursuant to this Court's decision in Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 424 (1982), and that the Bar defendants were immune from monetary liability.

We then filed an appeal to the Sixth Circuit Court of Appeals, which affirmed the district court's dismissal, on January 11, 1993. In its decision, the Sixth Circuit held that federal court abstention, pursuant to Middlesex, was required; that there was no case holding that federal ethical standards prevail over state ethical standards, and that the prior completion of the state disciplinary proceedings rendered our requests for declaratory and injunctive relief moot.

The Sixth Circuit decision also held that the Bar defendants were entitled to judicial and state action immunity from our claims for monetary relief.

Issues presented to the Sixth Circuit by us that were not addressed were the issues of federal official immunity, res judicata, and the need to consider if the state proceedings created an impermissible effect on the federal civil rights statutory scheme, as set down in this Court's decision in Gade v. National Solid Wastes Management Ass'n, ___ U.S.___, 112 S.Ct. 2374 (1992).

In our Petition For Rehearing With Suggestion For Rehearing En Banc, we pointed out the above omissions, and also made claim that the decision was contrary to cited decisions of this Court, other Circuit Courts of Appeals, as well as prior Sixth Circuit decisions.

Our Petition For Rehearing With Suggestion For Rehearing En Banc was overruled by the Sixth Circuit on March 12, 1993.

E. Summation.

When our client forced us to accept the package offer of $130,000 for both his then-

appealed judgment and our claim for a reasonable attorney's fee, and the federal trial judge refused to intervene, we found ourselves in a most nightmarish situation from which we could not extricate ourselves. First, our client determined what was to be our reasonable fee; then a state trial court determined what was to be our reasonable fee; and finally, the Ohio Supreme Court determined what constituted a reasonable fee.

All told, these post-federal trial court proceedings during the past four years have forced us to expend nearly 3,000 hours in attempting to defend ourselves, and have immobilized us insofar as undertaking the representation of other federal litigants since 1989.

Further, our one-year suspensions by the Ohio Supreme Court has destroyed our reputations and professional careers, as we are now obliged to wear, in perpetuity, the public badge of "SHYSTER."

On March 23, 1993, the United States Court of Appeals for the Sixth Circuit entered its Orders striking our names from the rolls of those attorneys authorized to practice law in that Court. This action was taken despite our prior and timely request on October 10, 1992 that we be afforded a hearing pursuant to the mandatory requirements of F.R.A.P. 46(b)&(c) and Sixth Circuit Rule 32(h).

Our suspensions from the United States District Court for the Northern District of Ohio, Eastern Division, is expected to soon occur; and likewise, without being afforded the opportunity for a hearing.

Suspensions from both courts being solely based upon our suspensions by the Ohio Supreme Court.

SUMMARY OF REASONS FOR GRANTING THE WRIT

Three federal district judges and all of the judges of the Sixth Circuit Court of Appeals believe that a State has concurrent jurisdiction with federal courts to supervise its licensed attorneys (when they are engaged in a federal statutory fee-shifting proceeding in a federal court), by being able to review the reasonableness of the attorney's fee, asked of a client, in that federal proceeding.

The inherent and obvious danger in the decision appealed from is that even if a federal judge determines the reasonableness of a requested fee, a State now has the right to second-guess that determination; and if the State disagrees, then it has the right to sanction its licensed lawyers. Any lawyer involved in federal fee-shifting litigation, therefore, is now in jeopardy of having to spend more time justifying his fee in the State than he spent in earning that fee in

To be safe then, federal practitioners in the Sixth Circuit should first submit a contemplated attorney's fee to their State for its prior approval before requesting that fee in a federal proceeding.

Further, private clubs of lawyers dispersed throughout the 88 counties of Ohio have been given the discretion, by the Ohio Supreme Court, to decide who may, or may not, compete with them in their geographic area, and their decision is invariably approved by the Board and the Ohio Supreme Court.

REASONS FOR GRANTING THE WRIT

1. THE SUPERVISION OF THE RELATIONSHIP BETWEEN AN ATTORNEY AND HIS CLIENT IN A FEDERAL FEE-SHIFTING ACTION MUST BE EXCLUSIVELY WITHIN FEDERAL COURT JURISDICTION SO AS TO ENSURE THE FULL ENFORCEMENT OF THE RIGHTS PROTECTED BY THE FEDERAL ACT.

The ethical standards for federal court attorneys are matters of federal law, In Re Snyder, 472 U.S. 634,645 n.6 (1985), and any

contrary state standards must be considered to be without effect. Cippolone v. Liggett Group, Inc., __U.S.__,__, 112 S.Ct. 2608,2617 (1992) (plurality opinion).

Even when a federal court adopts state ethical standards, how those standards are applied are matters of federal law. In Re American Airlines, Inc., 972 F.2d 605,610 (CA5,1992), cert. den'd 113 S.Ct. __, (1993).

One of the oldest legal doctrines in American law is that one court does not have jurisdiction to disbar an attorney for acts of contempt committed in another court. In Re Bradley, 7 Wall 364, 74 U.S. 364,372 (1868). By the same logic, therefor, claimed acts of wrongdoing in a federal court proceeding are purely federal in nature, and the Ohio Supreme Court had no jurisdiction, from the outset, to interpose its judgment for that of the involved federal judge.

Whether the requested fee was "excessive" turns upon whether federal or state standards

are applied, but it was not that type of conduct that is generally condemned by lawyers. In Re Ruffalo, 390 U.S. 545,555 (1968). (White, J., concurring).

Our case involved a federal fee-shifting statute, 42 U.S.C. §1988, whose overriding concern is to obtain sufficiently competent counsel to handle federal civil rights actions, Kay v. Ehrler, __U.S.__, 111 S.Ct. 1435,1437 (1991), by guaranteeing a reasonable fee to an attorney if he is successful in obtaining relief for his client. Pennsylvania v. Delaware Valley Council For Clean Air, 483 U.S. 711,726 (1987).

Moreover, since federal civil rights actions are fundamentally different from ordinary civil actions, Kirchoff v. Flynn, 786 F.2d 320,326 (CA7,1986); Cowan v. Prudential Life Insurance Co., 935 F.2d 522,526 (CA2, 1991), and Romberg v. Nichols, 970 F.2d 512, 519 (CA9,1992), vac'd on other grnds __U.S. __, 113 S.Ct. 1038 (1993), the perspective as

to wrongdoing likewise must differ.

Since §1988 is silent as to preemption, and where there exists a "[s]ignificant conflict between some federal policy or interest and those of state law," the federal courts have found it necessary in a "[f]ew and restricted instances" to develop a federal common law. Milwaukee v. Illinois, 451 U.S. 304, 313 (1981). Since this case involved the settlement of a federal court action wherein the interests are preeminently federal in nature, it should be determined according to federal common law principles. Mathewson Corp v. Allied Industries, Inc., 827 F.2d 850,853 n.3 (CA1,1987).

A dominant federal interest exists herein because a federal stautory scheme of the highest priority was involved. New York Gaslight Club, Inc. v. Carey, 447 U.S. 54,63 (1980) and City of Riverside v. Rivera, 477 U.S. 561,575 (1986).

It was the determination of Congress that

if a potential federal civil rights plaintiff is unable to obtain competent counsel to represent him, then many legitimate claims will go unvindicated. Pennsylvania v. Delaware Valley Citizens Council for Clean Air, 478 U.S. 546,565 (1986).

As such, in the interests of sound judicial administration, the court that is in the best position to determine an issue should make resolve that issue. Pierce v. Underwood, 487 U.S. 552,559-60 (1988).

This Court has held that the involved federal district court judge is in the best position to determine the reasonableness of a requested fee. Hensley v. Eckerhart, 461 U.S. 424,437 (1983) and Commissioner, I.N.S. v. Jean, 496 U.S. 154,161 (1990). Recently, the decisions in Butler v. Dowd, 979 F.2d 661,676 (CA8,1992); Ortiz v. Regan, 980 F.2d 138,141 (CA2,1992), and Dague v. Burlington, 976 F.2d 801,804 (CA2,1991).

The Sixth Circuit decision, at A10, stated

as follows:

> ...we know of no authority, and plaintiffs have cited none, stating that federal disciplinary standards preempt states from disciplining attorneys for improper acts performed in federal courts.

But, it was not determined if the enforcement of the state ethical standards involved herein would unduly interfere with the Congressional civil rights statutory scheme, as required by this Court in Gade v. National Solid Wastes Management Ass'n, __U.S.__, 112 S.Ct. 2374,2383 (1992), and cases therein.

Consequently, the present position of the Sixth Circuit is in direct conflict with that of the Third Circuit in Baylson v. Disciplinary Counsel of the Supreme Court of Pennsylvania, 975 F.2d 102,111 (CA3,1992), wherein it was held that state ethical rules that conflict with, or are incompatible with, federal law, are preempted.

2. A STATE CANNOT IMPOSE DISCIPLINARY SANCTIONS AGAINST ITS LICENSED LAWYERS FOR FEDERAL COURT CONDUCT WHICH IS AUTHORIZED, OR

HAS NOT BEEN PROHIBITED, BY THE FEDERAL COURT SYSTEM.

Inasmuch as there was no precedent from this Court that our requested fee was contrary to federal law principles, we were not on notice that such requested fee could possibly be considered to be unethical. As such, both the state and federal disciplinary sanctions imposed against us were in violation of federal constitutional Due Process. In Re Ruffalo, supra, 554, (White, J., concurring); Securities Industry v. Clarke, 898 F.2d 318, 321-22 (CA7,1990), and Boettcher v. Hartford Insurance Co., 927 F.2d 23,26 (CA1,1991).

The State of Ohio relied on Venegas v. Mitchell, 495 U.S. 82 (1990), as their basis for our claimed misconduct. But Venegas was decided after our requested fee, involved different facts, and held that the enforcement of a contingent fee contract had to be consistent with the purposes of §1988, and was, therefore, inapplicable to our conduct.

We undertook the representation of this client on this Court's guarantee that we would get a reasonable fee from a federal court if we were successful -- not because our client had a good chance for a large monetary recovery upon trial. Pennsylvania v. Delaware Valley Citizens Council for Clean Air, 483 U.S., at 726.

The end result, however, was that the state of Ohio cancelled out that guarantee when it intruded into the federal domain and interposed its own after-the-fact new rules. Rules that we were unaware of when we took the case or requested what we considered to be a reasonable fee under federal law.

3. STATE REGULATION OF THE FEES AN ATTORNEY MAY ASK OF HIS CLIENT IN THE SETTLEMENT OF A POST-TRIAL FEDERAL FEE-SHIFTING PROCEEDING WOULD SIGNIFICANTLY INTERFERE WITH THE ACCOMPLISHMENT OF THE PURPOSES AND OBJECTIVES OF THE INVOLVED FEDERAL ACT BY DETERRING COMPETENT COUNSEL FROM HANDLING SUCH CASES.

As noted previously, the Ohio Supreme Court refused to address our federal preemption claims, although repeatedly asked by us.

In its Opinion, the district court held that we did not show any Congressional intent in §1988 to preempt state attorney ethical standards, A23; that the federal Civil Rights Act was not primarily concerned with attorney fees, but with the vindication of a client's federal constitutional rights, A24, and that the State was investigating a fee agreement, not a potential attorney fee award. A24.

However, this Court has held that federal preemption is compelled, whether it is explicitly stated in the language of a federal statute, or is implicitly contained in the structure and purpose thereof. Fidelity Federal Savings & Loan Ass'n v. De la Cuesta, 458 U.S. 141,153 (1982) and Jones v. Rath Packing Co., 430 U.S. 519,525 (1977).

If a statute does not explicitly state an intent to preempt state law, a federal court

is to be guided by the goals and policies of the federal statute in order to determine its preemptive intent. International Paper Co. v. Ouellette, 479 U.S. 481,493 (1978). As argued previously, the overriding statutory concern of §1988 was to attract sufficiently competent attorneys to handle federal civil rights actions. Kay v. Ehrler, supra, 1437.

Federal preemption is implicit if an Act of Congress touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject, or if the goals "[s]ought to be obtained.." and the "[o]bligations imposed" reveal a purpose to preclude state authority. Wisconsin Public Intervenor v. Mortier, __U.S.__,__, 111 S.Ct. 2476,2481-82 (1991). As noted above, all of our work was done in furtherance of a federal statutory scheme of the highest Congressional priority, supra, page 22.

As mentioned at pp. 5-6, supra, our client

owed us $40,000 prior to our entering into a 50%-50% contingent fee trial contract, but the State felt that the contingent fee contract was the only controlling criteria as to what our fee should have been. In In Re San Juan Dupont Plaza Hotel Fire Litigation, 768 F. Supp. 912,921-22 (D,PR,1991), rev'd on other grnds 982 F.2d 603 (CA1,1992), (a non federal civil rights federal court proceeding involving the distribution between a class and an attorney of a settlement fund), the Court held that it was not limited to the face amount of a contingent fee contract, and that it was not inappropriate to compare a potential hourly award. It was further held that a high hee is appropriate where the risk of non-payment rested with the attorney, and that the Court was required to consider whether the fee allowed is sufficient to encourage competent counsel to undertake such comparable litigation in the future.

The same logic applies to all federal fee-

shifting litigation wherein the motivating inducement for an attorney to undertake such work is the guarantee of a reasonable statutory fee if success is attained.

Gade, supra, 2388, held that state standards which interfere with, or are contrary to, federal law are preempted. Further, that the ultimate task of a federal court is to determine if state regulation is consistent with the structure and purpose of the federal Act. 2383. Also, that a federal court must look to the effect of a state law on a federal statutory scheme. 2387. (Emphasis).

The State's position that it was only investigating a settlement fund division arising from federal litigation, rather than an award of attorney fees by a federal court, has no bearing on the federal preemption issue, since its activity (irrespective of the label placed thereon) had an impermissible effect on a federal statutory scheme. Although the Gade inquiry requirements were

requested of the Sixth Circuit, a discussion of Gade is not to be found in its Opinion.

In our case, there was a separate contract for appellate work plus a contingent contract for trial work. Somehow, they became homogenized by the State, but it is to be noted that in Venegas, supra, 90, this Court specifically left unresolved the amount of federal court supervision to be exercised in the enforcement of contingent fee contracts in federal civil rights proceedings.

4. THE PRINCIPLES OF YOUNGER ABSTENTION ARE NOT APPLICABLE WHEN A STATE IMPERMISSIBLY INTRUDES INTO AN EXCLUSIVELY FEDERAL DOMAIN.

The issue as to whether facially conclusive claims of federal preemption are not susceptible to federal court abstention, under Younger v. Harris, 401 U.S. 37 (1971), was not decided by this Court in New Orleans Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350,367 (1989); where the State, unlike the present case, did

not seek to intrude into the federal domain.

The jurisdictional issue involved in New Orleans turned upon whether the activity in question was characterized as intrastate vs. interstate. Such determinations are often highly factual specific, and depend upon the expertise of state administrative agencies charged with the economic regulation of a particular industry. Congress and the state legislature have delegated frontline authority to such state agencies to find the facts, and to adopt economic regulations due to their specialized knowledge of the industries to be regulated. See CSXT, Inc. v. Pitz, 883 F.2d 468,471-74 (CA6,1989), cert den'd 494 U.S. 1030 (1990).

But, in contrast, Congress has not delegated authority to the states to determine reasonable fees for successful attorneys in a federal fee-shifting action, nor do the states possess specialized expertise in that area of the law.

In Re Apex Oil Co., 980 F.2d 1150,1152 n.7 (CA8,1992) and In Re Pan American Airlines Corp., 950 F.2d 839,847 (CA2,1991), held that federal court abstention concerns are not implicated when federal questions are presented, as Supremacy Clause questions are "essentially ones of federal policy," quoting from Hagans v. Lavine, 415 U.S. 528,550 (1974).

Nor did the cases relied upon below to support Middlesex abstention, A10, n.5, involve federal proceedings or a federal fee-shifting statute. (Younger abstention being the basis for Middlesex abstention).

5. THE ABSTENTION PRINCIPLES SET DOWN IN YOUNGER AND MIDDLESEX ARE NOT FURTHERED WHEN THE INVOLVED AND UNDERLYING SUBSTANTIVE LAW PRINCIPLES ARE EXCLUSIVELY FEDERAL.

Abstention under Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 424 (1982) requires that the underlying state attorney disciplinary proceeding be within

the appellate jurisdiction of the state's highest court. Ohio Civil Rights Comm. v. Dayton Christian Schools, 477 U.S. 619,627 (1986). Because the Ohio Supreme Court never had any jurisdiction to regulate its licensed attorney's conduct in a federal fee-shifting proceeding, it never had jurisdiction at all.

Middlesex involved an attorney making derogatory remarks about a state judge in a state proceeding. Query. If that same lawyer had made derogatory remarks about a federal judge in a federal proceeding, would the outcome have been the same? Once again look to the holding in the 1868 case of In Re Bradley.

Historically, without exception, all of the decisions of this Court that required Younger abstention dealt with the enforcement of state created standards, not federally created standards. Younger v. Harris (state criminal trial); Huffman v.Pursue Limited, 420 U.S. 592 (1975) (obscenity under state nuisance law); Trainor v. Hernandez, 431 U.S.

434 (1977) (state welfare fraud); Moore v. Sims, 442 U.S. 415 (1979) (state child abuse), and Ohio Civil Rights Comm v. Dayton Christian Schools, supra, (state standards of sexual discrimination) OR this Court's decisions dealt with state court proceedings concerning the enforcement of state court orders: Juidice v. Vail, 430 U.S. 327 (1977) (state court contempt proceedings); Trainor v. Hernandez, supra, (state attachment statutes), and Pennzoil Co. v. Texaco, Inc., 481 U.S. 1,13 (1987) (state appeal bond requirements).

The Younger abstention doctrine was based upon concerns of comity and federalism. 401 U.S., at 44. But state court comity is not applicable when important federal interests are involved. United States v. Gillock, 445 U.S. 360,373 (1980).

Moreover, the interests of federalism are not well-served by a rule that essential national policies are displaced by state regulations intended to achieve more limited

ends. F.T.C. v. Ticor Insurance Co., ___U.S. ___,___, 112 S.Ct. 2169,2178 (1992).

As the law now stands in the Sixth Circuit, the states now have the right to establish the federal policy regarding the reasonableness of a settlement fund division between a successful lawyer and his client in a federal fee-shifting proceeding.

6. AN APPLICANT'S REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF FROM A FEDERAL COURT, AGAINST STATE COURT ACTION, IS NOT MOOTED WHEN THE STATE COURT HAS ACTED WITHOUT JURISDICTION; HAS FAILED TO ADDRESS PROPERLY PRESENTED FEDERAL ISSUES, AND THE INJURY TO THE APPLICANT PERSISTS.

Robinson v. Ariyoshi, 753 F.2d 1468 (CA9, 1985) held that preclusive effect cannot be given to a prior state court judgment if the affected party did not have a full and fair opportunity to litigate his federal claims in the state court, or where the state court demonstrated an inability or unwillingness to

protect federal rights, citing Haring v. Prosise, 462 U.S. 306 (1983).

Page 12, supra, describes our frustration and that of E.J. Leizerman in this regard. Middlesex, supra, 431, upheld Younger abstention based upon the principle that there is no presumption that the state courts will not safeguard federal rights. 457 U.S., at 431. However, this Court has never decided whether Younger abstention principles are applicable when the state court proceedings have been completed and presented federal rights have not been protected by the state courts. New Orleans, supra, 369 n.4.

As was said in United States Catholic Conference v. Abortion Rights Mobilization, Inc. 487 U.S. 72,77 (1988):

> The challenge in this case goes to the subject matter jurisdiction of the court and hence its power to issue the order. The distinction between subject-matter jurisdiction and waivable defenses is not a mere nicety of legal metaphysics. It rests instead on the central principle of a free society that courts have finite bounds of authority, some of constitu-

> tutional origin, which exist to protect citizens from the very wrong asserted here, the excessive use of judicial power. The courts, no less than the political branches of the government, must respect the limits of their authority.

Since the Ohio Supreme Court had no jurisdiction to issue its disciplinary Order, such Order cannot be given preclusive effect so as to moot our federal court requests for declaratory and injunctive relief.

This Court recently held in Church of Scientology of California v. United States, ___U.S.___,___, 113 S.Ct. 447,449 (1992), that a federal court appeal is mooted by events which occur while the case is pending that make it impossible for the appellate court to grant "[any] effective relief whatever" to the appealing party, quoting Mills v. Green, 159 U.S. 651,653 (1895).

Let it be clearly understood that that is hardly the situation in our case, and that all our efforts in the federal courts, and this Court, have been appeals for effective relief.

7. WHEN FIRST STATE, AND THEN FEDERAL COURTS FAIL TO ADDRESS PROPERLY PRESENTED FEDERAL ISSUES BY AN APPLICANT, THEN THAT APPLICANT IS DENIED THE PROTECTION OF THE FIRST AND FIFTH AMENDMENTS.

Woods v. Orange County, 715 F.2d 1543,1547 (CA11,1983), held that depriving a federal court of jurisdiction to decide federal claims, where the affected party did not have a full and fair opportunity to have his claims litigated in a prior state court proceeding; would, in effect, deprive that party of any forum, state or federal, for the resolution of those claims. Further, that such effect would pose federal constitutional Due Process problems, citing Testa v. Katt, 330 U.S. 386 (1947) and General Oil Co. v. Crain, 209 U.S. 211 (1908).

Moreover, the right of access to the courts is part of the First Amendment right to petition the government for a redress of grievances. California Motor Transport Co. v.

Trucking Unlimited, 404 U.S. 508,510 (1971) and Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731,741 (1983).

When the Sixth Circuit failed to initially address, or on our Request For Rehearing, the omitted federal Issues set forth on page 15, supra, then there was a violation of our federal constitutional Due Process and First Amendment rights to have any forum, state or federal, determine our federal claims.

8. IF PRIVATE ATTORNEYS, WHO ARE URGED BY CONGRESS TO PERFORM THE DUTIES OF SALARIED GOVERNMENT ATTORNEYS, ARE NOT PROVIDED WITH ABSOLUTE FEDERAL OFFICIAL IMMUNITY FROM STATE REGULATION WHEN PERFORMING THOSE DUTIES, THEN SAID STATE REGULATION IS CALCULATED TO DIMINISH THE AVAILABILITY OF COMPETENT PRIVATE ATTORNEYS.

As mentioned, the issue of federal official immunity has yet to be addressed by the state or federal court systems.

The concept was simple. Instead of provi-

ding additional federal funds for the enforcement of federal civil rights claims by salaried federal government attorneys, Congress chose instead to cloak federal civil rights plaintiffs "in a mantle of public interest," by encouraging the enforcement of federal civil rights laws by inducing private lawyers away from their state law practices by the promise of a reasonable fee if they were successful in fullfilling a governmental responsibility. Hensley v. Eckerhart, supra, 443 n.2 (Brennan, J., concurring in part and dissenting in part).

Ulike the facts in Ferri v. Ackerman, 444 U.S. 193,203-05 (1980) -- which held that federal public defenders were not entitled to federal "official immunity" from state court malpratice suits -- we were not in an adversarial relationship with the United States government in the performance of a designated function. Rather, we were doing the work that would normally have been performed by sal-

aried federal government attorneys.

In Ferri v. Ackerman, at pages 204-205, it was held that the most persuasive reason for granting federal official immunity would be if, by granting such immunity, there would be a reduction in monetary compensation for the handling of criminal cases for indigent defendants, or the burden of defending groundless state attorney malpractice and/or attorney disciplinary proceedings, would reduce the supply of lawyers willing to handle such cases. Note also that public defenders are salaried.

In direct contrast, the state regulation of a requested attorney's fee in the successful litigation of a federal fee-shifting statute will reduce the supply of attorneys willing to handle such cases, in direct contravention of the purposes of federal fee-shifting statutes.

As said before, spending 3,000 hours to justify your federal fee is quite pointless.

9. THE INVOLVED FEDERAL TRIAL JUDGE IS IN THE BEST POSITION TO DETERMINE THE REASONABLENESS OF A REQUESTED FEE, AND A COMPLAINING PARTY IS REQUIRED TO FILE HIS OBJECTIONS WITH SAID JUDGE, AND OBTAIN HIS RULING, AS A CONDITION PRECEDENT TO ANY SUBSEQUENT COMPLAINT TO STATE DISCIPLINARY AUTHORITIES.

Our case did not involve a class action or a fund in the possession of the court, so there was no need for our trial judge to make a determination as to attorney fees without there being a timely objection filed by the party opposing a requested fee. United States v. Vague, 697 F.2d 805,808 (CA7,1983).

A party who opposes a requested attorney's fee has a responsibility to state his opbjections thereto in the federal district court with particularity and clarity. Pfeifer v. Sentry Insurance, 745 F. Supp. 1435,1443 (ED, Wisc,1991), citing Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 776 F.2d 646,664 (CA7, 1985).

Further, an attorney fee dispute between a federal court attorney and his client is collateral to the merits of the claims for relief, Sprague v. Ticonic National Bank, 307 U.S. 161,170 (1939), so that a federal district court has continuing jurisdiction over such dispute even after the completion of the proceedings on the merits. Willy v. Coastal Corp., __U.S.__,__, 112 S.Ct. 1076, 1080 (1992).

Also, such a requirement would be consistent with federal res judicata principles. FDIC v. Moitie, 452 U.S. 394,398 (1981), which held that res judicata is applicable to any issue that was decided, or could have been decided, by a prior judgment.

10. THE COMMON LAW BASIS FOR JUDICIAL OR QUASI-JUDICIAL IMMUNITY IS NOT FURTHERED BY PROVIDING ABSOLUTE IMMUNITY TO PRIVATE CITIZENS, WHOSE COMPLAINED OF ACTIONS ARE NOT INTIMATELY ASSOCIATED WITH THE JUDICIAL PHASE OF A STATE PROCEEDING.

The lower Court held that the Bar defendants were entitled to quasi-judicial immunity merely because they acted as "[arms] of the Supreme Court of Ohio ..." in the state disciplinary proceedings. A6.

However, whether an individual is entitled to such immunity is to be determined on a functional basis; i.e., whether he is performing in an adjudicative capacity. Forester v. White, 484 U.S. 219,224 (1988).

The Bar defendants herein were not acting in a judicial capacity in the state disciplinary proceedings; but rather, were acting in a prosecutional capacity.

Admittedly, absolute judicial immunity is applicable to activities that are intimately associated with the judicial phase of a proceeding; that is, the initiation of formal charges and the presentation of the state's case. Imbler v. Pachtman, 424 U.S. 409,431 (1976) and Burns v. Reed, __U.S.__,__, 111 S.Ct. 1934,1943-44 (1991). The necessary

inquiry herein, therefore, was whether the complained of activities of the Bar were investigative or prosecutional.

But, a court is required to make a factual determination as to whether the complained of activities were investigative or prosecutional, and whether the complained of conduct was sufficiently associated with the judicial phase of the proceedings as to be entitled to absolute immunity. Houston v. Partee, 978 F.2d 362,366 (CA7,1992), citing the prior decision of the Sixth Circuit in Joseph v. Patterson, 795 F.2d 549,555 (CA6,1985).

A reading of both Opinions of the Sixth Circuit and the federal district court will disclose that no such factual determination was made by either Court.

Of interest, this Question is similar to Question I involved in Buckley v. Fitzsimmons 952 F.2d 965 (CA7,1992), cert. gr'd __U.S.__, 113 S.Ct. 53 (1992), argued Feb. 22, 1993.

11. THE BASIS FOR STATE ACTION IMMUNITY -- FEDERALISM AND STATE SOVEREIGNTY -- ARE NOT FURTHERED BY GRANTING IMMUNITY TO AN ASSOCIATION OF PRIVATE CITIZENS WHEN THERE IS AN IMPERMISSIBLE RISK THAT THOSE CITIZENS WILL FURTHER THEIR OWN INTERESTS RATHER THAN THE GOVERNMENT'S.

The doctrine of state action immunity to federal anti-trust claims is based upon the principles of federalism and state sovereignty. Columbia, South Carolina v. Omni Outdoor Advertising, Inc., __U.S.__,__, 111 S.Ct. 1344,1349 (1990). In that regard, it has already been shown that federalism would not be furthered by granting state action immunity to the Bar defendants.

Nor were the actions of the Bar required by the State acting as a sovereign, Goldfarb v. Virginia State Bar Ass'n, 421 U.S. 773,790 (1975), as a State has no sovereign authority to investigage and determine what constitutes a reasonable attorney's fee in a federal

court fee-shifting proceeding. As such, the actions of the Bar defendants cannot be considered as valid government action. Cf. Allied Tube and Conduit Corp. v. Indian Head, Inc., 486 U.S. 492,499 (1988).

In Young v. United States, ex rel. Vuilton et Fils S.A., 481 U.S. 787,805 (1987), it was held that an impermissible conflict of interest was created by the use of attorneys, who had a personal interest in a particular matter, to act as a prosecutor in a federal court criminal contempt proceeding.

That same conflcit exists when a private club of lawyers, who are in competition with unpopular non-club lawyers in the same geographic area, are permitted to act as prosecutors in a state disciplinary action. It is uncommon for a state bar association to bring disciplinary actions against unpopular and/or unorthodox lawyers. Zauderer v. Disciplinary Counsel of the Ohio Supreme Court, 471 U.S. 626,666-67 n.10 (1985). (Brennan, J., con-

curring in part and dissenting in part).

12. THIS COURT, PURSUANT TO ITS RULE 10.1(a) and (c), SHOULD EXERCISE ITS SUPERVISORY POWERS TO COMPEL THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT TO ADJUDICATE ALL UNADDRESSED ISSUES IN ACCORDANCE WITH THIS COURT'S STANDARDS.

Rule 10.1 (a) and (c) provide as follows:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

In Young v. United States, ex rel. Vuilton et Fils S.A., supra, the basis for this Court's decision was the use of its supervisory powers over the lower federal courts.

This Court has held that, in the exercise of such supervisory powers, it can modify, or reverse, judgments of lower federal courts in accordance with principles derived neither from the United States Constitution nor from any Act of Congress. United States v. Hastings, 461 U.S. 499,505 (1983).

This Court may require a lower federal court, through its supervisory powers, to follow procedures deemed desirable from the viewpoint of sound judicial administration. Cupp v. Naughton, 414 U.S. 141,146 (1973).

In the present case, the U.S. Court of Appeals for the Sixth Circuit failed to follow prior decisions of this Court; other U.S. Circuit Court of Appeals; its own prior decisions, and failed to consider the applicable preemption standards set down by this Court in Gade v. National Solid Wastes Management Ass'n, supra. Nor did it consider all of the Issues presented to it.

Those deficiencies and omissions were set

forth in our Petition For Rehearing En Banc, which was overruled on March 12, 1993.

13. IN ORDER TO ASSURE THAT AN APPEAL AS OF RIGHT TO A U.S. CIRCUIT COURT OF APPEALS IS EFFECTIVE, SO AS TO SATISFY THE FIRST AMENDMENT'S ACCESS TO THE COURTS REQUIREMENT AND THE FIFTH AMENDMENT'S DUE PROCESS REQUIREMENTS, A UNITED STATES COURT OF APPEALS IS OBLIGED TO ADDRESS EACH PROPERLY PRESENTED ISSUE AND TO FOLLOW THIS COURT'S STANDARDS.

The First Amendment aspect of this argument was oreviously discussed at pages 39-40.

The federal Due Process Clause requires a meaningful opportunity to have claims heard and decided by a court. Boddie v. Connecticut 401 U.S. 371,378 (1971).

Inasmuch as Congress created a system for appeals as of right to United States Circuit Courts of Appeals, federal constitutional Due Process is denied when governmental action constitutes the deprivation of an established adjudicatory procedure. Logan v. Zimmerman

Brush Co., 455 U.S. 422,433 (1982).

Federal constitutional Due Process requires the opportunity for an individual to present his case and to have the merits thereof fairly adjudicated. Ambus v. Granite Board of Education, 975 F.2d 1555,1568 (CA10, 1992).

When Issues are unaddressed and this Court's standards are not followed in a federal appellate proceeding, then there has been a denial of a meaningful opportunity to have federal claims heard and decided in a proper manner.

For all these reasons, the application of state professional codes that immobilize and discourage federal court practitioners from undertaking federal fee-shifting litigation, as Ohio has done here, presents important federal statutory and constitutional questions that should be resolved by this Court.

CONCLUSION

The Court should issue a writ of certiorari to review the federal statutory and constitutional challenges to the United States Circuit Court of Appeals for the Sixth Circuit's decision, wherein it condoned and approved of the actions of the Ohio Supreme Court herein, and encourages further federal court interference by the state of Ohio, by its clear message that it will not intervene to stop such state activity.

Respectfully submitted,

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 91-4178

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SANFORD J. BERGER;
ROBERT M. FERTEL,
Plaintiffs-Appellants,

v.

CUYAHOGA COUNTY BAR ASSOCIATION, et al.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio

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Decided and Filed January 11, 1993

Before: BOGGS and SUHRHEINRICH, Circuit Judges; and WELLFORD, Senior Circuit Judge.

SUHRHEINRICH, Circuit Judge. Plaintiffs Sanford J. Berger and Robert M. Fertel appeal the dismissal of their complaint seeking injunctive, declaratory, and monetary relief for claims arising out of state bar disciplinary proceedings brought against them. The district court dismissed the complaint on the basis of *Younger* abstention and the state action immunity. We hold that plaintiffs' claims are barred by judicial immunity, state action immunity, *Younger* abstention, and mootness. We AFFIRM.

I. FACTS

Plaintiffs are attorneys licensed to practice law in Ohio. They represented Daniel Gurish in a federal civil rights action in which the jury awarded Gurish $100,000 in damages. Plaintiffs filed a motion to recover their fees under 42 U.S.C. § 1988.[1] This prompted a settlement offer of $130,000, inclusive of attorney fees. Against plaintiffs' advice, Gurish accepted the settlement offer.

Plaintiffs and Gurish disagreed as to the proper division of the settlement amount. Plaintiffs maintained that they were entitled to 50% of the original jury award of $100,000 *plus* the additional $30,000 award in the settlement, for a total of $80,000. Gurish contended that he was to receive $100,000, the full amount of his jury award. As a result of the dispute, Gurish obtained new counsel and brought suit against plaintiffs. Gurish ultimately settled with plaintiffs for $65,000, half of the settlement amount.

Although the matter was resolved, Gurish filed a complaint with the Cuyahoga County Bar Association regarding plaintiffs' conduct. An investigation by the Certified Grievance Committee of the Ohio Bar Association followed.[2] The Grievance Committee scheduled an Investigative Hearing for November 20, 1989. At the hearing, the Grievance Committee found probable cause to file a formal complaint against plaintiff

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[1]Section 1988(b) provides, in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title . . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

[2]This committee is certified by the Board of Commissioners on Grievances and Discipline of the Supreme Court (Board of Commissioners) and is authorized to investigate complaints alleging attorney or judicial misconduct. *See* Supreme Court Rule for the Government of the Bar V, § 6(c) [hereinafter Supreme Court Rule].

Berger. The matter was referred to a probable cause panel.[3]

The Grievance Committee also filed an initial complaint against plaintiff Fertel based on testimony presented at the hearing. Another Investigatory Hearing was held on February 8, 1990, at which probable cause was found to support a formal complaint against plaintiff Fertel. This matter was also referred to a probable cause panel. Both complaints against plaintiffs were certified on October 18, 1990, and a formal hearing was held on April 19, 1991.

On January 23, 1990, in the midst of the investigation, plaintiff Berger filed a complaint in federal district court seeking a declaratory judgment, injunctive relief, money damages, and costs. On February 28, 1990, plaintiff Berger amended the complaint to add Fertel as a plaintiff. Plaintiffs alleged various constitutional and antitrust violations on the part of the Ohio Supreme Court, the Cuyahoga County Bar Association, its committees, and its members.

On September 19, 1991, the district court dismissed the complaint based on *Younger* abstention and state action immunity from the antitrust claims. Plaintiffs filed a motion to alter or amend judgment which the district court denied. This timely appeal followed.

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[3]The Grievance Committee's finding of probable cause is preliminary. The matter must be reviewed by a probable cause panel composed of three members of the Board of Commissioners. The panel reviews the matter to decide whether probable cause exists to charge an attorney with misconduct. If so, the formal complaint and a summary of the Grievance Committee's findings are sent to the Secretary of the Board of Commissioners who may certify the formal complaint and forward it to the Board of Commissioners if the Secretary finds that probable cause exists. Supreme Court Rule V, §§ 10-11. Once certified, the respondent must file an answer to the complaint. Supreme Court Rule V, § 12(a). Once the answer is received, a hearing panel of three commissioners is appointed and a formal adjudicatory hearing is held. Supreme Court Rule V, § 13. If disciplinary action is recommended by the panel, the matter is referred to the Supreme Court of Ohio for final decision. Supreme Court Rule V, § 18.

On September 2, 1992, during the pendency of this appeal, the Supreme Court of Ohio issued a decision finding that plaintiffs had charged an excessive fee, had withheld settlement proceeds from their client, and had interfered with the bar association investigation. Because of these infractions, the court suspended plaintiffs from the practice of law for one year. *Cuyahoga County Bar Ass'n v. Berger*, 64 Ohio St. 3d 454 (1992) (per curiam).

II. STANDARDS OF REVIEW

We review decisions to abstain de novo. *Federal Express Corp. v. Tennessee Pub. Serv. Comm'n*, 925 F.2d 962, 967 (6th Cir.), *cert. denied*, 112 S. Ct. 59 (1991); *Litteral v. Bach*, 869 F.2d 297, 298 (6th Cir. 1989); *Traughber v. Beauchane*, 760 F.2d 673, 676 (6th Cir. 1985). Further, the application of judicial immunity and state action immunity are questions of law which we also review de novo. *Crooks v. Maynard*, 913 F.2d 699, 700 (9th Cir. 1990) (judicial immunity); *Grayson Elec. Co. v. Sacramento Mun. Util. Dist.*, 770 F.2d 833, 835 (9th Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986) (state action immunity).

Questions of jurisdiction are fundamental matters which we may review sua sponte. *Carras v. Williams*, 807 F.2d 1286, 1289 n.5 (6th Cir. 1986). Thus, we address the problem of mootness on our own motion.

III. ANALYSIS

On appeal, plaintiffs contend that the Ohio disciplinary action is an improper exercise of state jurisdiction, which is by federal law preempted as well as being unconstitutional. Plaintiffs also raise antitrust claims. Plaintiffs seek money damages for the alleged constitutional and antitrust violations, an injunction against the state proceedings, and a declaratory judgment that the proceedings are unconstitutional. Defendants counter that these claims are not properly before this court because of

immunity and *Younger* abstention. We address plaintiffs' claims seeking money damages first.

A. MONEY DAMAGES

1. Judicial Immunity

Plaintiffs seek money damages for constitutional and antitrust violations. Defendants maintain that, under doctrines of immunity, these claims are barred.

Traditionally, judges have enjoyed broad immunity from suit for judicial acts. *Forrester v. White*, 484 U.S. 219, 225 (1988). Judicial immunity, however, does not preclude suit for prospective relief such as an injunction. *Pulliam v. Allen*, 466 U.S. 522, 541-42 (1984). Further, the existence of judicial immunity depends on whether the offending actions were taken to carry out a judicial function. *Forrester*, 484 U.S. at 227. *See Sparks v. Character and Fitness Comm.*, 859 F.2d 428, 432-34 (6th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989).

However, judges may be entitled to different types of immunity if non-judicial functions are involved. For example, the Supreme Court has held that judges who promulgate a code of conduct for attorneys act in a legislative capacity and are entitled to legislative immunity from suits based on such actions, rather than judicial immunity. *Forrester*, 484 U.S. at 228. On the other hand, a judge who enforces a code of conduct is entitled to prosecutorial immunity. *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 736-37 (1980). *See Forrester*, 484 U.S. at 228-29. Because prosecutors are absolutely immune from suit for money damages, judges acting as enforcers are also absolutely immune from suit for money damages. *Consumers Union*, 446 U.S. at 736; *Imbler v. Pachtman*, 424 U.S. 409, 421-29 (1976).

In the present appeal, defendants' role was that of an enforcer. Thus, under *Forrester* and *Consumers Union*,

the Supreme Court of Ohio and its justices are immune from suit for money damages. The Cuyahoga County Bar Association, its committees and members are likewise immune from suit because they acted as arms of the Supreme Court of Ohio in performing a function for which the court and its justices are immune. *Sparks*, 859 F.2d at 433 ("[I]t is of no moment that the actor is a designee of the justices of [the Supreme Court of Ohio] rather than the justices themselves."). *See also Watts v. Burkhart*, 61 U.S.L.W. 2274 (6th Cir. Oct. 28, 1992) (en banc) (discussing prosecutorial and judicial immunity).

2. State Action Immunity

Plaintiffs also allege that the disciplinary rules and proceedings are unreasonable restraints on trade which violate the Sherman Act, 15 U.S.C. §§ 1 through 7. Defendants raise state action immunity in defense to this claim.

The Supreme Court has stated that state action immunity precludes application of the Sherman Act to state programs. *Parker v. Brown*, 317 U.S. 341, 352 (1943). This is because the Sherman Act was not intended to limit state programs which "derive [their] authority and . . . efficacy from the legislative command of [a sovereign] state." *Id.* at 350.

The Court has applied this doctrine to the promulgation and enforcement of codes of ethical conduct for attorneys. In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Court held that disciplinary rules promulgated by a state supreme court pursuant to a constitutional grant of authority over the practice of law are directives of the sovereign which qualify for state action immunity. *Id.* at 359-63.

In the present case, plaintiffs violated Ohio disciplinary rules regarding fees, settlement proceeds, and disciplinary investigations. These rules were promulgated by the Supreme Court of Ohio pursuant to its constitutional grant

of power to regulate the practice of law. *See* Ohio Const. art. IV, § 2(B)(1)(g). Promulgation and enforcement of the rules are plainly exercises of Ohio's sovereign power. Under *Bates*, state action immunity exists and plaintiffs' antitrust claims are barred.

B. INJUNCTIVE AND DECLARATORY RELIEF

1. *Younger* Abstention

Plaintiffs sought to enjoin the state disciplinary proceedings and to have the proceedings declared unconstitutional. Defendants respond that the district court properly abstained under *Younger*.

In *Younger v. Harris*, 401 U.S. 37 (1971), the Supreme Court held that a federal court should not enjoin a pending state criminal proceeding unless "the danger of irreparable loss is both great and immediate." *Id.* at 45 (quoting *Fenner v. Boykin*, 271 U.S. 240, 243 (1926)). The Supreme Court extended *Younger* "to noncriminal judicial proceedings when important state interests are involved." *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). *See Moore v. Sims*, 442 U.S. 415, 423 (1979); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604-05 (1975).

In *Middlesex*, a case similar to the present appeal, a lawyer challenged disciplinary proceedings of the New Jersey Bar Association by filing suit in federal court. He contended that the proceedings violated his First Amendment rights. *Middlesex*, 457 U.S. at 427-29. The Court held that the federal district court correctly dismissed the case based on *Younger*. As part of its analysis, the Court enunciated a three-part inquiry for the application of *Younger* abstention to state bar disciplinary hearings:

> [F]irst, do state bar disciplinary hearings within the constitutionally prescribed jurisdiction of the State Supreme Court constitute an ongoing state

> judicial proceeding; second, do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges.

Id. at 432 (emphasis omitted). The similarities between the present appeal and *Middlesex* demand that we likewise abstain in this case.

As to the first question, the *Middlesex* Court found that the New Jersey State Constitution vested the power to govern and discipline the bar in the New Jersey Supreme Court and that the New Jersey proceedings were judicial in nature and the first prong of *Middlesex* was satisfied. *Id.* at 433-34. Similarly, Ohio's constitution vests original jurisdiction in its supreme court over "[a]dmission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law." Ohio Const. art. IV, § 2(B)(1)(g). Thus, the proceedings are within the "constitutionally-prescribed jurisdiction" of the Supreme Court of Ohio.

Further, like the New Jersey proceedings, the Ohio disciplinary proceedings are carried out by committees which are arms of the Ohio Supreme Court. A Grievance Committee reviews an initial complaint and investigates to decide if a prima facie case of improper conduct exists; if so, a formal hearing is held. The supreme court ultimately decides what discipline should be given. *Cf. id.* at 425-27. Thus, the Ohio procedures are judicial in nature and the first prong of *Middlesex* is satisfied.

Regarding the second prong of the *Middlesex* test, the Court found "an extremely important [state] interest in maintaining and assuring the professional conduct of the attorneys it licenses." *Id.* at 434. Indicative of that interest was the very fact that the New Jersey Bar Association, an agency of the state, was involved as a defendant in federal court and the initiator of state proceedings. *Id.* at 434-35. Here, the Ohio defendants were also involved in federal litigation to protect Ohio's

role in maintaining the integrity of its legal profession. As in New Jersey, regulation of the legal profession is of great importance to Ohio and the second prong is satisfied.

In evaluating the third prong of its analysis, the Court stated that "[s]o long as the constitutional claims of respondents can be determined in the state proceedings and so long as there is no showing of bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate, the federal courts should abstain." *Id.* at 435. The Court found that the New Jersey proceedings provided the respondent with the opportunity to present his constitutional claims by answering the complaint against him and raising the issues to the committees and the Supreme Court of New Jersey. *Id.* at 435-36. Like the respondent in *Middlesex*, plaintiffs had the opportunity to present their constitutional claims in their answer to the complaint against them.[4]

Plaintiffs allege bad faith and harassment on the part of the Grievance Committee. First, they argue the proceedings harass civil rights attorneys, thereby impairing federal rights under 42 U.S.C. § 1983. However, plaintiffs have not alleged specific facts showing a concerted effort to discipline only civil rights attorneys. Second, they argue the proceedings were brought in bad faith because of past conflicts in litigation with members of the Grievance Committee. This argument is without merit. The very nature of our

[4]The Court also found that respondent had an adequate opportunity to present his arguments because the New Jersey Supreme Court had reviewed the constitutional issues sua sponte. The Supreme Court of Ohio did not engage in such a review, but that is not dispositive. Prior to considering New Jersey's sua sponte review, the Court stated that the proceedings themselves made "it . . . difficult to conclude that there was no 'adequate opportunity' for respondent . . . to raise his constitutional claims." *Id.* at 435-36. Thus, the New Jersey Supreme Court's review was merely an additional fact, not the linchpin of the decision. The Ohio proceedings allowed plaintiffs the same opportunity to present constitutional arguments as the respondent in *Middlesex* had.

adversarial legal system requires attorneys to oppose each other during litigation in order to represent zealously the interests of the client. Since the bar association is a self-governing body, it is inevitable that attorneys who have disagreed in prior matters will eventually be called on to discipline each other. Absent specific facts demonstrating bad faith by the Committee, we find that the third *Middlesex* factor requires abstention.[5]

Finally, plaintiffs argue that *Middlesex* is inapplicable because the conduct which violated the state disciplinary rule in *Middlesex* arose in a state court case based on state law whereas the present conduct arose in a federal court case based on federal law. This argument is also without merit. Federal courts have the inherent authority to discipline attorneys practicing before them and to set standards for their conduct. *See Stone v. Philadelphia and AFSCME Dist. Council 33, Local 159*, No. 86-1877, 1986 WL 13483, at *4 (D. Pa. Nov. 25, 1986); *International Business Machs. Corp. v. Levin*, 579 F.2d 271, 279 n.2 (3d Cir. 1978). Nevertheless, we know of no authority, and plaintiffs have cited none, stating that federal disciplinary standards preempt states from disciplining attorneys for improper acts performed in federal courts.[6] *Younger* abstention is appropriate in this instance.

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[5]Our decision is consistent with the findings of other courts which have refused to interfere with state bar proceedings. *See Hefner v. Alexander*, 779 F.2d 277, 279-80 (5th Cir. 1985); *Mason v. Departmental Disciplinary Comm.*, 894 F.2d 512, 514-16 (2d Cir.), *cert. denied*, 110 S. Ct. 3274 (1990); *Richardson v. The Florida Bar*, No. 90-C984, 1990 U.S. Dist. LEXIS 5864, at *10-11 (D.D.C. May 15, 1990); *Gipson v. New Jersey, Supreme Court*, 558 F.2d 701, 703-04 (3d Cir. 1977) (pre-*Middlesex* case).

[6]Even if preemption applies, it does not preclude abstention unless the state court is actually denied jurisdiction by federal statute. The reason is straightforward: state courts are as capable of adjudicating preemption claims as federal courts. *Federal Express Corp. v. Tennessee Public Serv. Comm'n*, 925 F.2d 962, 968 (6th Cir.), *cert. denied*, 112 S. Ct. 59 (1991); *CSXT, Inc. v. Pitz*, 883 F.2d 468, 471-74 (6th Cir. 1989), *cert. denied*, 494 U.S. 1030 (1990).

2. Mootness

Although not raised by the parties, we also find that issuance of the decision by the Ohio Supreme Court moots plaintiffs' claims for injunctive and declaratory relief against defendants. We are therefore without power to hear these claims. U.S. Const. art. III, § 2; *Carras v. Williams*, 807 F.2d 1286, 1289 (6th Cir. 1986). "Mootness results when events occur during the pendency of the litigation which render the court unable to grant the requested relief." *Carras*, 807 F.2d at 1289.[7] Nothing remains to be enjoined or declared improper.

For all the foregoing reasons, we AFFIRM.

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[7]In *Carras*, the Supreme Court had denied a writ of certiorari to appeal a state supreme court decision. *Carras*, 807 F.2d at 1288. Although the *Carras* court emphasized the denial of certiorari as mooting the corresponding federal suit seeking to enjoin the state court proceedings, we nevertheless find that the claims for injunctive and declaratory relief are also moot.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

(Filed on September 19, 1991)

SANFORD J. BERGER, et al.	()	1:90 CV 119
Plaintiffs	()	
- vs -	()	ORDER
THE CUYAHOGA COUNTY BAR ASS'N, et al.	()	
Defendants	()	

Battisti, J.

Before the Court are Plainiffs' motion for injunctive relief, Defendants' motions to dismiss, Plaintiffs' motions to add new parties, for an expeditious ruling, and to file additional pleadings. For the reasons set forth below, the Court grants Defendants' motions to dismiss. Plaintifs' miscellaneous motions are moot.

FACTS

This case arises out of a disciplinary proceeding brought by defendant Cuyahoga County Bar Association, involving Plaintiffs,

attorneys Sanford J. Berger and Robert M. Fertel. The disciplinary proceeding in turn resulted from a dispute over legal fees between Plaintiffs and their former client, Daniel Gurish.

Plaintiffs seek to have the Court enjoin the Bar Association from going forward with its disciplinary proceeding. Plaintiffs also seek to have the court enjoin numerous other defendants, among them: The Grievance Committee of the Cuyahoga County Bar ASsociation; Lawrence Turbow, an investigator for the Grievance Committee; J. Warren Bettis, Disciplinary Counsel for the Bar Association; the Board of Commissioners on Grievances and Discipline of the Bar ASsociation; and the Supreme Court of Ohio. (Mr. Gurish and his new counsel, Thomas L. Meros, were defendants at an earlier point in the litigation. Plaintiffs have moved to add more Bar Association officials and other individuals involved in the disciplinary proceedings, among them:

Marshall Wolf, Ellen S. Mandell, Frederick L. Oremus, Thomas G. Knoll, Charles E. Brown, Ohmer O. Crowell, and Howard R. Besser. As already mentioned, given the disposition of the case, Plaintiffs' motion is moot.)

From 1983 to 1989, Plaintiffs Berger and Fertel represented their client in a federal civil rights action. They were successful in two appeals before the Sixth Circuit.

On July 28, 1988, the matter went to trial before a jury, which five days later returned a verdict for the plaintiff of $100,000. The court then entered judgment in that amount, along with reasonable attorney fees and costs. Berger and Fertel subsequently filed a motion for their fees. During hearings on the issue of attorney fees, the parties began negotiations to bring the matter to a conlcusion.

On February 9, 1989, the defendants offered a settlement of $130,000, including attorney fees, which Berger and Fertel rejec-

ted. Their client, however, wished to settle the case. As was the client's right, he directed Berger and Fertel to accept the offer.

Berger and Fertel then asserted that they were entitled to receive fees of $80,000, while their client was to get the remainder of $50,000. The client was unsatisfied with this division and retained new counsel.

The client's new counsel attempted to gain a review of the fees before the trial court that had tried the underlying civil rights action. After his motion was dismissed for lack of jurisidiction, the settlement having been entered already, he filed suit in state court and also filed a complaint with the Bar Association. Berger and Fertel refused to submit this matter to arbitration, as requested by the Bar Association.

On November 20, 1989, the Bar Association Grievance Committee held an investigative hearing. An estimated fifty (50) lawyers were present, some of whom had been opposing

counsel in previous cases litigated by Berger and Fertel, or were involved in other disputes with them. The Grievance Committee voted to refer the investigation to a Trial Committee. Although Berger and Fertel and their client later settled their disagreement, the Bar Association investigation is still pending.

DISCUSSION

As a preliminary matter, this Court notes it does not reach the questions of whether Plaintiff Berger and Fertel's attorney fees were reasonable or pursuant to an agreement. For the purposes of a motion to dismiss, the complaint is construed in the light most favorable to the plaintiff and its allegations taken as true. Lee v. Western Reserve Psychiatric Habilitation Center, 747 F.2d 1062, 1065 (6th Cir. 1984).

In their motion for attorney fees, Plaintiffs requested $191,000. In the present complaint, they allege that their client had

agreed to not only a contingent fee arrangement, whereby they would receive half of any judgment for damages, but also fees for their appellate work plus any additional attorney fees which they would have received under federal civil rights statutes. Thus, the $80,000 apparently represents half of the jury verdict ($50,000) in addition to the difference between the settlement offer, which included attorney fees, and the verdict ($30,000).

Regardless, this Court must abstain from interfering with the ongoing Bar Association investigation. It is by now well-established that federal courts should not stay or enjoin pending state prosecutions. Younger v. Harris 401 U.S. 37 (1971). Instead, they should abstain because of important federalism concerns in respecting state institutions' ability "to perform their separate functions in their separate ways." Id. at 44.

Specifically, the Supreme Court has ex-

tended the doctrine of Younger abstention to insulate from federal review state bar association disciplinary proceedings. Middlesex Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982). Indeeed, the Court set a high standard of deference to state courts. "where vital state interests are involved, a federal court should abstain 'unless state law clearly bars the interposition of the constitutional claims.'" Id., quoted in Watts v. Burkhart, 854 F.2d 839,845 (6th Cir. 1988).

In Middlesex, the plaintiff was an attorney who had made remarks about a judge's abilities and racial attitudes during a criminal trial. He challenged a New Jersey Bar Association ethics inquiry into his behavior. The Supreme Court determined that Younger-abstention was appropriate under three crieria.

First, "the notion of comity" between

federal and state courts applied to the proceedings because they were judicial in nature, having been established under the state constitution and state supreme court rules. Middlesex, 457 U.S. at 431-34.

Second, the proceedings implicated important state interests in assuring the ethical and professional conduct of the legal profession. The Court observed that "[s]tates traditionally have exercised extensive control over the professional conduct of attorneys." Id. at 434.

Third, the proceedings provided adequate opportunities for the accused to raise constitutional challenges. Id. at 435. The procedural posture was unusual though: it was onlyu after the attorneys began federal litigation that the state supreme court considered constitutional objections to the bar proceedings. Id. at 436.

The Middlesex decision is on point and dispositive. Like the New Jersey Bar Associ-

iation-disciplinary proceedings, the Ohio Bar Association disciplinary proceedings have been established under the state constitution and state supreme court rules. See Ohio Const. Art. IV, § 2(B)(1)(g), § 5(B); Ohio S.Ct. Rule V. The Ohio Constitution provides that, "[t]he supreme court...shall make rules governing the admission to the practice of law and discipline of persons so admitted." Ohio Const. Art.IV,§5(B). Under its authority, the Ohio Supreme Court has authorized bar associations like the present Defendant to initiate grievance proceedings. Ohio S.Ct. Rule V(6)(c).

The state of New Jersey and Ohio have identical interests in overseeing the professional conduct of members of their respective bars.

Moreover, Plaintiffs bear the burden of showing "that state procedural law bar[s] presentation of [their] claims." Federal Express v. Tennessee Public Service Comm.,

925 F.2d 962,970 (6th Cir. 1991) (internal quotes omitted). They have not cited state laws or regulations that preclude the constitutional challenges which they would like to present. Plaintiffs will be able to raise their arguments within the disciplinary proceedings, especially if they reach disposition before the Ohio Supreme Court. Ohio S. Ct. Rule V(20). Unlike the Middlesex situation, attorneys facing disciplinary actions in this state do not need to resort to federal litigation to ensure that they will have an opportunity to raise their constitutional claims.

Although the Sixth Circuit has not yet considered abstention under these exact circumstances, other circuits have held that abstention is appropriate in the context of a bar association disciplinary proceeding. The fact patterns in those cases and the present case are virtually indistinguishable. In each, plaintiffs were attorneys who were subject to

bar association disciplinary proceedings; they tried to have a federal district court enjoin the bar association. See, e.g., Mason v. Departmental Disciplinary Committee, 894 F.2d 512 (2nd Cir. 1990), cert. denied 58 U.S.L.W. 3835 (1990); Richardson v. Florida State Bar, 1990-2 Trade Cas. (CCH) P 69,111 (D.D.C. 1990). See also Heffner v. Alexander, 779 F.2d 277 (5th Cir. 1985); Director of Lawyers Professional Responsibility Board v. Perl, 752 F.2d 353 (8th Cir. 1985).

Plaintiffs have not alleged that the Ohio Supreme Court or the Bar Association have adopted rules dramatically different than the other state supreme courts and Bar Associations involved in previous cases of abstention.

Instead, their Hydra-like arguments repeat in many different ways the same basic proposition. They argue that the Bar Association lacks jurisdiction over their conduct because federal civil rights statutes contain

provisions on attorney fees, which they contend pre-empt state bar association regulations on the subject. Alternatively, they argue that their own status as "private attorneys general" protects their fee-arrangements from Bar Association review.

The Sixth Circuit has rejected similar pre-emption arguments against abstention. Simply put, it has stated that a potential pre-emption issue does not alter abstention analysis. Federal Express, 925 F.2d 962; CSXT, Inc. v. Pitz, 883 F.2d 468 (6th Cir. 1989), cert. denied 58 U.S.L.W. 3596 (1990). In both decisions, the pre-emption argument was stronger than it is here, as federal regulatory schemes were present.

Plaintiffs have raised interesting and important issues. But their arguments should be raised within the Bar Association proceedings or addressed to the Ohio Supreme Court. They have not pointed out any federal statute or regulation of attorney fees in civil right

actions that expressly or impliedly pre-empts state bar association standards. Furthermore, they have not shown any Congressional intention to preempt state actions in this area.

To the contrary, defendants persuasively argue that the federal civil rights statutes are not primarily concerned with attorney fees. Furthermore, to the extent that the statutes address attorney fees and "private attorneys general," they make it clear that the client and the vindication of his constitutional rights are the paramount concerns. See Evans v. Jeff D., 475 U.S. 717, 730-32 (1986) (discussing fees). A proper concern for attorney fees does not conflict with the policies embodied in federal civil rights statutes.

In the disciplinary proceedings at issue here, the Bar Association appears to be investigating the agreement between Plaintiffs and their client regarding fees, rather than any potential award of attorney fees under

civil rights statutes. And again, it is important to note that Plaintiffs have had and will continue to have opportunities to present their arguments within the course of Bar Association proceedings.

Plaintiffs also allege that the Younger exceptions are applicable. Their strongest argument for an exception is essentially that bad faith or bias has infected the bar association disciplinary proceedings. Taking the complaint as true, it does not allege facts sufficient to constitute bad faith or bias, as they are defined for abstention analysis.

The standard for evaluating claims of bad faith and bias is difficult to meet. As another court that abstained from interfering with a bar proceeding expalined, "Younger and its progeny make it obvious that the 'bad faith' exception is narrow and should be granted parsimoniously." Hefner, 779 F.2d at 280. For example, New York attorney C. Vernon Mason, whose representation of Tawana Brawley

in a much-publicized case led to a state bar investigation of his conduct, was unable to "set forth circumstances that warrant federal court intervention." Mason, 894 F. 2d at 515. His allegations, in a case with highly charged racial overtones, were far more serious than the ones raised here.

Here, Plaintiffs allege bad faith and bias because one of three investigators assigned to their case before the Bar Association also serves as opposing counsel in unrelated litigation brought by Plaintiffs. Additionally, they allege selective prosecution because another colleague, who had a fee dispute with a client, was not subject to Bar Association investigation.

Although the Bar Association might well avoid assigning investigators to cases where they have a possible conflict of interest, Plaintiffs' allegations fall short of the bad faith standard. The Bar ASsociation's failure to conduct itself in an ideal manner, while

regrettable, does not overcome the strong policies of Younger abstention.

Plaintiffs refer to correspondence with the Bar Association and meetings that occurred as part of the disciplinary proceedings as revealing a "vindictive, retaliatory attitude on the part of the Bar Ass[ociation]." Plaintiffs' Motions For Preliminary and Permanent Injunctions at 30-33. Plaintiffs' list of events actually reveals nothing but the activities ordinarily expected in a Bar Association proceeding. If the Bar Association had neglected to crrespond with Plaintiffs or refused to meet with them, that would have been more telling.

In contrast to this case, the rare instances of federal courts applying Younger exception have involved allegations of egregious bad faith and bias. The single case where a bar association investigation fell within the bad faith exception involved a series of bar actions over the course of

several years. Bishop v. State Bar of Texas, 736 F.2d 292 (5th Cir. 1984). Even there, the court dismissed the plaintiff's broad attacks on the bar procedures, allowing him to proceed only insofar as he could demonstrate a pattern of harrassment. Id. at 294. Despite his efforts at a full hearing, he was not able to demonstrate any such harrassment. Bishop v. State Bar of Texas, 791 F.2d 435 (5th Cir. 1986).

In an extraordinary case where a federal district court did enjoin a state criminal prosecution of an attorney, his allegations "painted a picture of pervasive racism and discriminatory treatment of blacks in the [] court system" as well as political motivations. Lewellen v. Raff, 843 F.2d 1103,1110 (8th Cir. 1988), cert. denied 489 U.S. 1033 (1989). The attorney also raised allegations of illegal surveillance tactics on the part of the defendants. Id. at 1114.

Finally, Plaintiffs raise antitrust

claims. They are correct in asserting that the Bar Association does not by virtue of its status enjoy immunity from antitrust laws. See Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). Plaintiffs challenge Bar Association proceedings which have beene stablished under the authority of the Ohio Supreme Court. Consequently, Plaintiffs' antittrust claims must be evaluated under the "state action doctrine."

The state action doctrine was created in recognition of the fact that federal antitrust laws were not meant to preclude state policies and regulation. Parker v. Brown, 317 U.S. 341 (1943). To gain state action immunity: (1) the state must clearly articulate and affirmatively express that the challenged restraint is its policy; (2) the state must actively supervise the challenged conduct. California Retail Liquor Dealers v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

As discussed, supra, the Ohio Supreme

Court has articulated a policy of bar association investigations. The first prong of the Midcal test is satisfied.

The Supreme Court recently held that a physician peer review process did not meet the requirements of the state action doctrine, but the Court reserved the question of whether judicial review of private conduct could ever satisfy the second prong of the Midcal test, "active supervision." Patrick v. Burget 486 U.S. 94,104 (1988). In the present situation, other courts have found that state supreme courts provide sufficient supervision over bar association proceedings. See Richardson, 1990-92 Trade Cas. (CCH) P 69,111; Hefner, 779 F.2d 277. See generally Hoover v. Ronwin, 466 U.S. 558 (1984) (state action immunity found for bar admission requirements).

While the Ohio Supreme Court does not play a large role at this juncture in the Bar Association investigation of Plaintiffs, it ultimately determines if and what sanctions

are necessary. Ohio S.Ct. Rule (V)(22). This Court finds that the Ohio Supreme Court does supervise the Bar Association.

The Court finds it unnecessary to consider the Eleventh Amendment and immunity issues presented by Defnedants.

Therefore, Defendants' motions to dismiss are GRANTED. IT IS SO ORDERED.

/s/ Frank J. Battisti
Frank J. Battisti
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

(Filed on October 19, 1991)

SANFORD J. BERGER, et al.	( )	1:90 CV 119
Plaintiffs	( )	
- vs -	( )	ORDER
THE CUYAHOGA COUNTY BAR ASSOCIATION, et al.	( )	
Defendants	( )	

Battisti, J.

Before the Court is Plaintiffs' motion to amend or alter judgment. For the reasons set forth below, the Court denies Plaintiffs' motion.

This case involved an effort on the part of Plaintiffs, attorneys Sanford J. Berger and Robert M. Fertel, to enjoin a disciplinary proceeding brought against them by Defendant Cuyahoga County Bar Association. The Court earlier granted Defendants' motions to dismiss. See Order of September 19, 1991.

In their present motion, Plaintiffs essentially seek reconsideration and reversal of this Court's previous decision. They present the same principal arguments raised and rejected earlier: (1) state bar associations disciplinary proceedings generally are pre-empted by and interfere with federal civil rights statutes; and (2) the ongoing investigation of their fee arrangements in this particular matter is infected with bad faith.

Again, Plaintiffs are unable to distinguish Supreme Court precedent that is directly on point, standing for the proposition that federal courts should not interfere with state bar association disciplinary proceedings. Middlesex Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982). Furthermore, Plaintiffs are unable to satisfy the requirements for either pre-emption or bad faith.

Both parties, in anticipation of an appeal, also seek clarification of the

Court's Order with regard to Plaintiffs' claims for monetary relief.

The Sixth Circuit has stated that even when abstention principles apply to equitable claims, they are not necessarily appropriate for monetary claims. Thus, in a case involving state agency investigation of the plaintiff's physician, his "claims for monetary relief and attorney[] fees should have been stayed rather than dismissed unless they can be redressed in the state proceeding." Watts v. Burkhart, 854 F.2d 839,849 (6th Cir. 1988) (citing Deakins v. Monaghan, 484 U.S. 193 (1988)). Compare Litteral v. Bach, 869 F.2d 297 (6th Cir. 1989) (abstention applicable to neither equitable nor monetary claims).

in the present case, Plaintiffs' claims for monetary relief have been evaluated separately. They need not be stayed because they must be dismissed for reasons unrelated to abstention.

The Court held that Plaintiffs' federal

antitrust claims were barred by the "state action doctrine." Order at 11-13. The Plaintiffs' constitutional claims, however, are not affected by the state action doctrine. The constitutional claims are properly resolved on grounds of immunity. See Sparks v. Character and Fitness Committee of Kentucky, 859 F.2d 428 (6th Cir. 1988). cert. denied 489 U.S. 1011 (1989).

Sparks involved a challenge to bar admission requirements. The Sixth Circuit, after remand from the Supreme Court, held that considering bar applications was "[a] 'judicial act' to which absolute immunity attached." Id. at 434. Even if the immunity here were not absolute but merely qualified, Plaintiffs have not overcome it.

The only complication is dicta which, taken out of context, reads,"Judicial immunity has not been granted to judges promulgating a code of conduct for attorneys." Id. at 432 (citing Supreme Court of Virginia v.

Consumers Union of United States, 446 U.S. 719 (1980). The statement could be interpreted to deny immunity in situations such as the instant case, where state courts and state bar associations are not setting standards for individuals wishing to join the bar but rather for their conduct once members. But such an anomolous result is unnecessary. A careful reading of the cases indicates that the correct interpretation does not affect immunity in this context.

in the Sparks opinion itself, for example, the Sixth Circuit cited with approval cases granting immunity to "memberts of an attorney disciplinary committee" and "a state bar association conducting disciplinary proceedings." Sparks, 859 F.2d at 43-31 (citing Simons v. Bellinger, 643 F.2d 774 (D.C. Cir. 1980) and Clark v, State of Washington, 366 F.2d 678 (9th Cir. 1966).

The Supreme Court case from which the seemingly contrary language is taken concer-

ned a constitutional challenge to attorney advertising regulations. Most importantly for present purposes, the Court held, inter alia, that the defendant state supreme court was immune from damages liability. Consumers Union, 446 U.S. at 736.[1]

While the Court remains concerned that the actions of the Defendants have the potential to affect federal civil rights litigation, and though the Court notes that the Bar Association has not always behaved in an ideal manner, Plaintiffs have had and will continue to have opportunities to raise their objections throughout the established grievance and invesitgation process. This Court, moreover, cannot assume that the Defendants will disregard their duty to stay within constitutional and legal restraints in carrying out their functions. Plaintiffs have not provided any reason to believe that the Ohio Supreme Court, in its role of ultimately evaluating bar association disciplinary dec-

isions and sanctions, will be prejudiced or otherwise unable to adjudicate the claims they have raised.

finally, the Court notes parallels between the present case and In Re Ruffalo. 390 U.S. 544 (1968). In the earlier case, the petitioner was an attorney who had an active practice within the area of the Federal Employers' Liability Act (FELA). A local bar association had disbarred him, but this Court found that he had not engaged in any misconduct.

The Supreme Court eventually held: "Though admission to practice before a federal court is derivative from membership in a state bar, disbarment by the State does not result in automatic disbarment by the federal court. Though the state action is entitled to respect, it is not conclusively binding on the federal courts." Id. at 547 (citation omitted). In part because the state bar association cannot determine the Plaintiffs'

professional status before this Court, this Court likewise is reluctant to interfere with bar proceedings.

Accordingly, the Plaintiffs' motion to amend or alter the judgment is DENIED. Their claims for monetary relief remain DISMISSED.

IT IS SO ORDERED.

/s/ Frank J. Battisti
Frank J. Battisti
United States District Judge

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1 Although the Supreme Court also permitted suit for declaratory and injunctive relief in Consumers Union, its decision allowed an attack on the state bar regulations generally rather than an appeal of a decision in a particular case. That is, the distinction between Consumers Union on the one hand, and Middlesex and the instant case on the other, is not between bar admission and bar discipline but between a general claim and a specific one. See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).

UNITED STATES CONSTITUTION

Supremacy Clause, Article VI, Clause 2

This Constitution and the Laws of the United States which shall be made in pursuance thereof; ..., shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, ..., nor be deprived of life, liberty, or property, without due process of law; ...

42 U.S.C. Section 1988
(in pertinent part)

In any action or proceeding to enforce a provision of sections ... 1981 of the Revised Statutes [42 USCS §§1981-1983, 1985, 1986], ... or title VI of the Civil Rights Act of 1964 [42 USCS §§1681 et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Supreme Court, U.S.
FILED
MAY 3 - 1993
OFFICE OF THE CLERK

No. 92-1604

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

SANFORD J. BERGER, et al.,

Petitioners,

v.

CUYAHOGA COUNTY BAR ASSOCIATION, et al.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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County Bar Association, et al.

QUESTION PRESENTED

Whether a local bar association, its attorney grievance committee and members of that committee are entitled to absolute and state action immunity from suit for money damages when the attorney grievance committee is certified by the relevant state supreme court to investigate and prosecute disciplinary complaints against attorneys and the disciplinary enforcement activities of the committee that are the subject of the suit were authorized and required under rules promulgated by the state supreme court.

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IN THE
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OCTOBER TERM, 1992

No. 92-1604

SANFORD J. BERGER, et al.,

Petitioners,

v.

CUYAHOGA COUNTY BAR ASSOCIATION, et al.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 983 F.2d 718. The opinion of the district court (Pet. App. A12-A31) is reported at 775 F. Supp. 1096.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1993. A timely petition for rehearing with suggestion for rehearing in banc was denied on March 12, 1993. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, Section 2(B)(1)(g) of the Ohio Constitution provides in pertinent part:

> The supreme court shall have original jurisdiction in the . . . [a]dmission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

Ohio Const. art. IV, § 2(B)(1)(g). The full text of Section 2 of Article IV is set forth at Resp. App., *infra*, A1-A3.

Respondents[1] also rely upon various sections of Rule V of the Supreme Court Rules for the Government

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[1] This brief in opposition is filed solely on behalf of respondents The Cuyahoga County Bar Association, the Certified Grievance Committee of the Cuyahoga County Bar Association, Richard S. Koblentz and Laurence A. Turbow.

of the Bar of Ohio. Pertinent portions of the text of Rule V are set forth at Resp. App., *infra*, A4-A40.[2]

STATEMENT OF THE CASE

On March 7, 1989, a complaint was filed with respondent The Cuyahoga County Bar Association (the "Bar Association") by Daniel Gurish against petitioner Sanford J. Berger, an attorney admitted to practice in the State of Ohio. The complaint concerned the fee arrangement under which Berger and petitioner Robert M. Fertel had represented Gurish in a civil rights action litigated in federal district court.

Gurish's complaint was ultimately referred to the Certified Grievance Committee of the Bar Association (the "Grievance Committee"), also a respondent herein. The Grievance Committee is certified by the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio (the "Board of Commissioners") pursuant to Rule V(6)(c) of the Supreme Court Rules for the Government of the Bar of Ohio (hereafter the "Supreme Court Rules"). *See* Resp. App. at A18-A19. This certification authorizes the Grievance Committee to

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[2] Omitted are Sections 23 through 30 of Rule V which address procedures following entry of an order by the Supreme Court of Ohio imposing certain disciplinary sanctions. The text of Rule V was substantially revised and reorganized by amendment effective July 1, 1992. The text reproduced at Resp. App. A4-A40 reflects the Rule prior to such amendment. *See* Ohio Rules of Court, State, 1992, 1421-48 (West 1991). Citations to specific sections of the Rule contained in this brief are to the Rule as effective prior to such amendment.

review and prosecute complaints and grievances alleging misconduct on the part of judges and attorneys as the initial step in the disciplinary procedures established under the Supreme Court Rules. The Grievance Committee is composed of members of the Bar Association and operates under the Board of Commissioners' Rules for Certified Grievance Committees.

Pursuant to Supreme Court Rule V(5)(a), the Grievance Committee held an Investigative Hearing on November 20, 1989 to determine whether a formal disciplinary complaint should be filed against Berger with the Board of Commissioners.[3] Based on the evidence adduced at the hearing, the Grievance Committee found probable cause that Berger's conduct regarding the fee arrangement with Gurish violated the Code of Professional Responsibility adopted by the Supreme Court of Ohio (hereafter the "Code") and directed that a formal complaint be filed with the Board of Commissioners against Berger.[4] Further, based on the testimony

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[3] The Grievance Committee is required to investigate any matter filed with it to determine whether probable cause exists for the filing of a formal complaint with the Board of Commissioners. Supreme Court Rule V(5)(a). *See* Resp. App. at A12-A13. An attorney who is the subject of a grievance must be given the opportunity to respond to the allegations of misconduct before a formal complaint is filed. *Id. See* Resp. App. at A14. The Grievance Committee has adopted the procedure of holding "investigative hearings" in order to fulfill these requirements.

[4] Under Supreme Court Rule V(6)(a), any violation of the Code constitutes misconduct for disciplinary purposes. *See* Resp. App. at

presented at the November 20 hearing, an initial complaint was filed with the Grievance Committee against Fertel by the Bar Association. An Investigative Hearing regarding that complaint was held on February 8, 1990, at which probable cause was found to support the filing and prosecution of a formal complaint against Fertel.

On January 23, 1990, petitioners filed with the United States District Court for the Northern District of Ohio a Complaint for Declaratory, Injunctive and

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A18. A finding of probable cause by a certified grievance committee is considered preliminary under the Supreme Court Rules; upon making such a finding, the Grievance Committee is required to forward to the Board of Commissioners a summary of its findings together with a copy of a formal complaint. Supreme Court Rule V(10)(b)(i). *See* Resp. App. at A23. This formal complaint is drafted by the Grievance Committee and is prosecuted in its name as Relator. Supreme Court Rule V(11). *See* Resp. App. at A24-A25. Upon receipt of a certified grievance committee's complaint, the Board of Commissioners refers the complaint to a probable cause panel for an independent determination whether probable cause exists for the filing of the formal complaint. Supreme Court Rule V10(b)(i). *See* Resp. App. at A23. If the panel finds that probable cause exists, it then certifies the formal complaint to the Board of Commissioners. *Id.* The respondent attorney then has an opportunity to file an answer to the formal complaint. Supreme Court Rule V(12)(a). *See* Resp. App. at A25-A26. A hearing panel of three commissioners is appointed and a formal adjudicatory hearing is held. Supreme Court Rule V(13)(A). *See* Resp. App. at A27. The hearing panel's findings and recommendations are then reviewed by the entire Board of Commissioners. Supreme Court Rule V(17). *See* Resp. App. at A30. If the Board of Commissioners upholds a finding of misconduct and determines that disciplinary action is merited, then the matter is certified to the Supreme Court of Ohio for final determination. Supreme Court Rules V(18) and V(22)(a). *See* Resp. App. at A30 and A32.

Monetary Relief and Request for Temporary Restraining Order ("Petitioners' Complaint"), alleging that the disciplinary proceedings that had been initiated against them were constitutionally and jurisdictionally deficient. Petitioners' request for a temporary restraining order prohibiting any further prosecution of the disciplinary charges was denied on February 1, 1990.

The Bar Association, the Grievance Committee, Richard S. Koblentz and Laurence A. Turbow (collectively, the "Bar Defendants")[5] filed their motion to dismiss on March 5, 1990, seeking dismissal of Petitioners' Complaint on the grounds that: (i) the doctrine of federal abstention articulated in *Younger v. Harris*, 401 U.S. 37 (1971), mandates rejection of petitioners' requests for injunctive and declaratory relief; (ii) the doctrines of judicial and prosecutorial immunity prevent petitioners from obtaining monetary relief against the Bar Defendants under 42 U.S.C. § 1983 ("Section 1983"); and (iii) the doctrine of state action immunity prohibits petitioners from maintaining a federal antitrust action against the Bar Defendants. The Supreme Court of Ohio, the Board of Commissioners, and J. Warren Bettis, Disciplinary Counsel of the Supreme Court of Ohio, were

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[5] Koblentz was chairman of the Grievance Committee at the time of the Investigatory Hearings. Turbow was a member of the Grievance Committee and had been assigned as the "investigator" responsible for initial review of the disciplinary complaints against petitioners pursuant to the Board of Commissioners' Rules for Certified Grievance Committees. Petitioners' Complaint is devoid of any factual allegations regarding the conduct of Koblentz or Turbow other than their participation in the Investigative Hearings.

also named as defendants in Petitioners' Complaint and filed their own motion to dismiss on March 6, 1990.

The district court issued its decision granting the motions to dismiss on September 19, 1991, holding, in relevant part, that *Younger* and its progeny require dismissal of petitioners' claims for injunctive and declaratory relief and that the state action doctrine bars petitioners' antitrust claim. *See* Pet. App. A12-A31. On October 18, 1991, the district court denied petitioners' Fed. R. Civ. P. 59(e) motion to alter or amend judgment, finding specifically that the Bar Defendants possess absolute immunity from damage liability with respect to their actions in initiating and prosecuting the disciplinary proceedings against petitioners. *See* Pet. App. A32-A41. Petitioners filed a timely appeal with the United States Court of Appeals for the Sixth Circuit.

Meanwhile, the state disciplinary proceedings against petitioners continued pursuant to the procedures set forth in the Supreme Court Rules. *See, supra*, pp. 4-5 at fn. 4. Following an adjudicatory hearing on the Grievance Committee's complaint, the Board of Commissioners adopted the hearing panel's finding that petitioners had violated various provisions of the Code and the Supreme Court Rules and recommended that they be suspended for one year from the practice of law in the State of Ohio. On September 2, 1992, the Supreme Court of Ohio issued its decision concurring in the findings and recommendations of the Board of Commissioners and entered judgment suspending petitioners from the practice of law for one year. *Cuyahoga County Bar Ass'n v. Berger*, 64 Ohio St. 3d 454, 597 N.E.2d 81 (1992) (per curiam). This Court denied petitioners' Petition for a Writ of

Certiorari to the Supreme Court of Ohio, No. 92-887, on January 19, 1993. *Berger v. Cuyahoga County Bar Ass'n*, ___ U.S. ___, 113 S.Ct. 1049 (1993).

On January 11, 1993, the court of appeals issued its opinion affirming in all respects the decision of the district court dismissing Petitioners' Complaint. Recognizing that the prosecutorial role of the Grievance Committee in the attorney disciplinary process is defined and controlled by the Supreme Court of Ohio, the court concluded that the Bar Defendants possessed absolute immunity from liability for their actions in prosecuting the disciplinary complaints against petitioners under the doctrines of judicial and state action immunity. *See* Pet. App. A5-A7. Further, the court found not only that the district court was required to abstain from exercising its equitable powers under the *Younger* doctrine, but that petitioners' requests for injunctive and declaratory relief had been rendered moot by the intervening decision of the Supreme Court of Ohio. *See* Pet. App. A7-A11. Petitioners' subsequent request for rehearing with suggestion for rehearing in banc was denied.

ARGUMENT

Petitioners have presented to the Court a laundry list of "questions" for review, the majority of which address the merits of their assorted claims regarding the alleged constitutional and jurisdictional infirmity of the state disciplinary proceedings. The dismissal of Petitioners' Complaint was premised solely on the affirmative defenses asserted by respondents. Despite petitioners' protestations to the contrary, issues related to the merits

of their claims were not before the court of appeals, nor may they properly be raised on review of that court's decision.

Moreover, petitioners' request for injunctive and declaratory relief from the state disciplinary proceedings are now moot since, as the court of appeals noted, "[n]othing remains to be enjoined or declared improper." *See* Pet. App. at A11. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). The issuance of the disciplinary decision by the Ohio Supreme Court and this Court's subsequent denial of the petition for writ of certiorari with respect to that decision concluded the state disciplinary proceedings and terminated petitioners' interest in obtaining the requested equitable relief.[6]

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[6] Petitioners apparently believe that the court of appeals possesses the authority to review and enjoin implementation of the Ohio Supreme Court's decision. It is well-settled that the lower federal courts "do not have jurisdiction . . . over challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional." *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486 (1983). Petitioners could only obtain review of the Ohio Supreme Court's decision from this Court on petition for writ of certiorari. *Id.* at 484 n. 16, quoting *MacKay v. Nesbett*, 412 F.2d 846 (9th Cir. 1969). *See also Stern v. Nix*, 840 F.2d 208, 212-13 (3d Cir.), *cert. denied*, 488 U.S. 826 (1988); *Howell v. State Bar of Texas*, 710 F.2d 1075, 1076-77 (5th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984). The Court's denial of such petition, in which petitioners presented "questions" virtually identical to those they now raise, forecloses their constitutional and jurisdictional challenge to the state disciplinary proceedings. *See Berger, et al., v. Cuyahoga County Bar Ass'n*, No. 92-

Despite petitioners' obfuscatory tactics, the only justiciable question presented for review is whether the Bar Defendants enjoy immunity from suit for money damages for their actions in undertaking the prosecution of the disciplinary complaints against petitioners. Petitioners have failed to offer any cognizable reason why this Court should review the court of appeals' holding that the Bar Defendants enjoy such immunity with respect to petitioners' civil rights and antitrust claims.

Absolute immunity from damage liability for judicial and prosecutorial acts is well-established. *See, e.g., Stump v. Sparkman*, 435 U.S. 349 (1978); *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Pierson v. Ray*, 886 U.S. 547 (1967). As petitioners concede, an individual's entitlement to immunity is based on the nature of the actions in question and is not restricted to a particular class of offices or actors. "[I]mmunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." *Forrester v. White*, 484 U.S. 219, 227 (1988) (emphasis in original). Thus, "[p]ublic policy requires 'absolute immunity . . . for all persons - governmental or otherwise - who [are] integral parts of the judicial process.' " *Sparks v. Character and Fitness Comm. of Kentucky*, 818 F.2d 541, 543 (6th Cir. 1987) ("*Sparks I*"), *vacated and remanded*, 484 U.S. 1022, *aff'd on remand*, 859 F.2d 428 (6th Cir. 1988) ("*Sparks II*"), *cert. denied*, 489 U.S. 1011 (1989).

887, Petition for a Writ of Certiorari to the Supreme Court of Ohio at pp. i-vi.

The court of appeals found that the Bar Defendants are entitled to absolute immunity in the instant case "because they acted as arms of the Supreme Court of Ohio in performing a function for which the court and its justices are immune." *See* Pet. App. at A6. This holding is in complete accord with the Court's functional approach to absolute immunity. Further, it is consistent with prior decisions recognizing that those persons, including bar associations and their members, who participate at the behest of a state supreme court in inherently judicial functions are entitled to absolute immunity from suit. *See e.g., Sparks II*, 859 F.2d at 434; *Simons v. Bellinger*, 643 F.2d 774, 785 (D.C. Cir. 1980); *Kissell v. Breskow*, 579 F. 2d 425, 430 (7th Cir. 1978); *Ginger v. Circuit Court for Wayne County*, 372 F.2d 621, 625 (6th Cir. 1967); *Clark v. Washington*, 366 F.2d 678, 681 (9th Cir. 1966). Petitioners have not identified a single decision holding to the contrary.

Petitioners instead assert that the court of appeals failed to make a "factual determination" whether the Bar Defendants' activities in acting upon the complaints filed against petitioners were "investigatory or prosecutional [sic]" in nature and, thus, "sufficiently associated" with the judicial phase of the proceedings. Petition at 46. Even assuming *arguendo* that such "error" would present a basis for review by this Court, petitioners' contention is false. The court of appeals considered the nature of the complained of activities, *i.e.*, the Investigative Hearings conducted by the Grievance Committee, and their role in the attorney discipline scheme established under the Supreme Court Rules. *See* Pet. App. at A2-A3. The court concluded that in undertaking those activities, the Bar Defendants were acting as "designees" of the Supreme

Court of Ohio and were performing a judicial function at the behest of that court. *See* Pet. App. at A6.

That determination was absolutely correct. The Investigative Hearings on the grievances filed against petitioners were conducted under the authority of the Supreme Court of Ohio to discipline the attorneys it licenses. Ohio Const. art. IV, § 2(B)(1)(g). Indeed, the Bar Defendants' actions were compelled by the Supreme Court Rules. Having been presented with the grievances, the Grievance Committee was required to determine whether there was evidence establishing probable cause sufficient for the filing of a formal complaint that the Grievance Committee would prosecute as Relator. Supreme Court Rules V(5)(a), V(6)(c) and V(11). *See*, *supra*, p. 4 at n. 3 and pp. 4-5 at n. 4. The hearings thus represented the first stage of judicial proceedings mandated by the Supreme Court of Ohio, wherein the committee members "were acting in substantially the same capacity and making essentially the same decision, as a Magistrate in a preliminary hearing, i.e., determining whether probable cause had been shown that a violation had been committed." *Simons*, 643 F.2d at 793 (MacKinnon, J., concurring).

There is, in short, no reason for review of the court of appeals' determination that the Bar Defendants are entitled to absolute immunity for their actions in conformance with the Supreme Court Rules. Petitioners are unable to point to a single decision rendered by this

or any other court which is in conflict with that holding.[7] Nor does the record suggest any grounds for exercise of the Court's supervisory powers with respect to that decision.

Petitioners also challenge the court of appeals' holding that their federal antitrust claim against the Bar Defendants is barred under the doctrine of state action immunity first articulated in *Parker v. Brown*, 317 U.S. 341 (1943). *See* Pet. App. at A6-A7. The applicability of the state action doctrine in the context of state licensing and disciplining of attorneys has been clearly established. *See, e.g., Hoover v. Ronwin*, 466 U.S. 558 (1984); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Hefner v. Alexander*, 779 F.2d 277 (5th Cir. 1985). As the court of appeals concluded, the disciplinary proceedings against petitioners "plainly" represented an exercise of the State's sovereign power. *See* Pet. App. at A7. Thus, the immunity enjoyed by the Supreme Court of Ohio under the state action doctrine extended to the Bar Defendants in their role as agents of the court in the disciplinary enforcement scheme. *See Bates*, 433 U.S. at 360.

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[7] Petitioners rely on this Court's decisions in *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) (prosecutor absolutely immune for initiating prosecution), and *Burns v. Reed*, ___ U.S. ___, 111 S.Ct. 1934, 1940 (1991) (prosecutor entitled to absolute immunity for conduct at probable cause hearing), for the proposition that absolute immunity is applicable only to those activities "intimately associated" with judicial proceedings. Petitioners do not explain how the Bar Defendants' actions in conducting the Investigative Hearings, thereby initiating the prosecution of the disciplinary charges against petitioners, are in any way distinguishable from the conduct at issue in *Imbler* and *Burns*.

Petitioners' argument that the Supreme Court of Ohio lacked the "sovereign authority" to discipline petitioners for violations of the Code and the Supreme Court Rules is frivolous, particularly in light of this Court's refusal to review the disciplinary judgment entered against petitioners.[8] The authority of the Ohio Supreme Court to promulgate and enforce the Code and the Supreme Court Rules and to delegate prosecutorial functions to local bar committees is indisputable. *See* Ohio Const., art. IV, § 2(B)(1)(g). Nothing in the Petition or the record of this case recommends that this or any other issue raised by petitioners merits the Court's attention.

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[8] Petitioners' allegation that the disciplinary proceedings against them involved determination of "what constitutes a reasonable attorney's fee in a federal court fee-shifting proceeding", Petition at 47-48, is demonstrably false. In fact, petitioners' own recitation of the facts reveals that a fee-shifting award was never entered in Gurish's civil rights case and that their dispute with Gurish involved the proper division of a settlement fund under the terms of their fee arrangement with Gurish. *See* Petition at 5-8.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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April 30, 1993

APPENDIX

Ohio Const., Art. IV, § 2

§ 2 The supreme court.

(A) The supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment.

(B) (1) The supreme court shall have original jurisdiction in the following:

(a) Quo warranto;
(b) Mandamus;
(c) Habeas corpus;
(d) Prohibition;
(e) Procedendo;
(f) In any cause on review as may be necessary to its complete determination;
(g) Admission to the practice of law, the discipline of persons so admitted,

and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

(i) Cases originating in the courts of appeals;

(ii) Cases in which the death penalty has been affirmed;

(iii) Cases involving questions arising under the constitution of the United States or of this state.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained.

(c) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

(d) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(e) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3(B)(4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from

invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor. (Amended May 7, 1968.)

RULE V OF THE SUPREME COURT RULES FOR THE GOVERNMENT OF THE BAR OF OHIO

Disciplinary Procedure. Pursuant to the powers of the Supreme Court over the Bar of this state and the members thereof, this rule is amended, as follows, effective on January 1, 1988, except Sections (1)(b), (3)(b), (3)(c)(i), (3)(c)(ii), and (3)(d) which shall be effective September 1, 1987, and shall apply to all pending cases.

(1)(a) *Creation of Board of Commissioners on Grievances and Discipline of the Supreme Court (hereinafter called Board of Commissioners or Board).*

There is hereby created a Board of Commissioners on Grievances and Discipline of the Supreme Court. The Board of Commissioners shall consist of twenty-eight (28) persons: seventeen (17) members of the Bar of the Supreme Court, seven (7) active or voluntarily retired judges of the State of Ohio, or judges retired by reason of age pursuant to Article IV, Section 6 of the Constitution of the State of Ohio, and four (4) nonlawyer members. The lawyer members of such Board shall be appointed from Ohio Appellate Districts as follows: District One (1), two (2) members; District Two (2), one (1) member; District Three (3), one (1) member; District Four (4), one (1) member; District Five (5), one (1) member; District Six (6), two (2) members; District Seven (7), one (1) member; District Eight (8), three (3) members; District Nine (9), one (1) member, District Ten (10), two (2) members; District Eleven (11), one (1) member; and District Twelve (12), one (1) member. Initial appointments under this rule shall be made as follows:

one (1) member shall be appointed from each of Districts One (1), Three (3), Six (6), Eight (8), Nine (9) and Eleven (11) for terms ending December 31, 1988; one (1) member shall be appointed from each of Districts One (1), Four (4), Six (6), Eight (8), Ten (10) and Twelve (12) for terms ending December 31, 1989 and one (1) member shall be appointed from each of Districts Two (2), Five (5), Seven (7), Eight (8) and Ten (10) for terms ending December 31, 1990. The active and retired judge members shall be members at large appointed from separate districts of the State of Ohio. The nonlawyer members of the Board shall be members at large appointed from separate districts of the State of Ohio. One (1) nonlawyer and two (2) judge members shall be appointed for terms ending December 31, 1988, one (1) nonlawyer and two (2) judge members shall be appointed for terms ending December 31, 1989 and two (2) nonlawyer and three (3) judge members shall be appointed for terms ending December 31, 1990. Thereafter, the term of office of each member of the Board of Commissioners shall be three (3) years, beginning on January 1 next following his appointment. Any member of the Board whose term has expired and who shall have an uncompleted assignment as a member of a panel shall continue to serve for the purpose of such assignment until it shall have been concluded before the Board of Commissioners, and further provided this his successor commissioner shall take no part in the proceedings of the Board concerning such assignment. The Chief Justice and Justices of the Supreme Court each shall appoint two (2) lawyer and one (1) judge member of the Board, each justice acting in order of seniority on the Supreme Court. Three (3) lawyer and four (4) nonlawyer

members shall be appointed by a majority vote of the Supreme Court.

Appointments to terms commencing January 1 of any year shall be made prior to December 1 of the preceding year. Vacancies for any cause shall be forthwith filled for the unexpired term by appointment by the Justice who appointed the person causing the vacancy, or the successor of that Justice. A person appointed to a term of fewer than three years may be reappointed to not more than two three-year terms. Otherwise, no person may be appointed to more than two three-year terms on the Board.

The Board shall each year elect a judge or attorney member as Chairman. The Chairman and Secretary shall each have authority to execute journal entries on behalf of the Board of Commissioners and of panels thereof. The Chairman shall serve in that capacity for no longer than a total of two (2) years.

The Board of Commissioners shall meet in Columbus at least six (6) times each year. The Chairman or the Secretary of the Board may call additional meetings of the Board when necessary.

(b) The terms of members of the Board of Commissioners on Grievances and Discipline of the Bar terminate on December 31, 1987. Members shall complete reports on completed hearings and file them with the Board prior to that date. On January 1, 1988, all proceedings that were pending before the Board of Commissioners on Grievances and Discipline of the Bar on December 31, 1987, are hereby transferred to the

Board of Commissioners on Grievances and Discipline of the Supreme Court.

(c) No member or employee of the Board of Commissioners on Grievances and Discipline of the Supreme Court, Disciplinary Counsel, or employee of the Office of Disciplinary Counsel, shall, while serving as a Commissioner, Disciplinary Counsel, or employee, make any contribution to, or for the benefit of, or take part in the campaign of, or campaign for or against, any judge, Justice, or judicial candidate in this state. This section does not prohibit a Board member who is a candidate for a judicial office or for reelection to a judicial office from making a contribution to, or for the benefit of, or taking part in his own campaign.

(2) **Jurisdiction of the Board.** The Board of Commissioners is empowered and charged to:

(a) receive, entertain, inquire into, take evidence, preserve the record, make findings and submit recommendations to the Supreme Court as hereinafter provided:

(i) concerning complaints of misconduct as hereinafter defined which are alleged to have been committed by a judge, an attorney and counselor at law, person under suspension from the practice of law, or on probation, or

(ii) concerning the mental illness of any judge or attorney and counselor at law, or

(iii) relating to petitions for reinstatement as an attorney and counselor at law in this state, or

(iv) upon reference by the Supreme Court of conduct by a judge or an attorney affecting any proceeding under this rule, where the acts allegedly constitute a contempt of the Supreme Court or a breach of these rules but did not take place in the presence of the Supreme Court or a member thereof, whether by willful disobedience of any order or judgment of the Supreme Court or the Board of Commissioners, by interference with any officer of the Supreme Court in the prosecution of any duty, or otherwise; provided that nothing herein shall be construed as limiting or affecting the plenary power of the Supreme Court to impose punishment with reference either to contempts or breaches of these rules committed in its presence or the plenary power of any other court with reference to contempts committed in its presence.

(b) The Board of Commissioners may issue informal, nonbinding advisory opinion letters in response to prospective or hypothetical questions regarding the application of these rules, the Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office, in response to any inquiry directed to the Board.

The Board shall adopt, subject to the approval of the Supreme Court, appropriate rules of procedure for the issuance of opinions under this rule.

(3) **Secretary; Disciplinary Counsel; Administration.**

(a) *Secretary.* There is hereby created the position of Secretary which shall be a full-time position. The Secretary shall be an attorney at law duly admitted to practice in the State of Ohio. The Secretary shall be appointed by a majority of the Board of Commissioners and shall serve at the pleasure of the Board. The Secretary shall have the overall scheduling, administrative and fiscal responsibility of the Board of Commissioners. The Secretary shall schedule all hearings for the Board and panels thereof; execute journal entries for extensions of time where appropriate; maintain the records of the receipt and expenditure of money; prepare financial reports and budgets as required by these rules, the Rules for the Government of the Judiciary and when requested by the Board of Commissioners; assist the Board in preparing opinion letters pursuant to Section (2)(b) of this rule; take all necessary steps to see that office facilities, furnishings, stationery, equipment and office supplies are available as needed; and any and all other action appropriate and consistent with his position as chief administrative and fiscal office and not otherwise inconsistent with these rules and the Rules for the Government of the Judiciary. The Secretary shall employ such personnel as are reasonably needed to discharge the responsibilities set forth above and shall establish the salaries of such personnel, subject to approval by the Board of Commissioners. Such Secretary and staff shall not otherwise be employed by any court. The Secretary shall file annually with the Supreme Court a report of the activities and expenses of the Board.

(b) *Disciplinary Counsel.* There is hereby created the position of Disciplinary Counsel, who shall be appointed by a majority vote of the Board of Commissioners, with the approval of the Supreme Court.

The Disciplinary Counsel shall be appointed for a term of four (4) years and shall be removed only for cause. Removal for cause shall be instituted by the filing of a written complaint by the Chairman, acting by authority of a majority of the Board of Commissioners, with the Chief Justice of the Supreme Court, who shall, upon receipt of such complaint, cause the same to be served upon the Disciplinary Counsel for response. Thereafter, the Chief Justice shall schedule a hearing before the Supreme Court, which shall conduct a hearing to determine whether there is sufficient cause for the removal of Disciplinary Counsel.

Assistant Disciplinary Counsel and staff in the Office of Disciplinary Counsel shall serve at the pleasure of the Disciplinary Counsel. Disciplinary Counsel may appoint such assistants as necessary who shall be attorneys at law admitted to practice in this state and who shall not engage in the private practice of law while serving in that capacity.

The Disciplinary Counsel shall appoint staff personnel as required to satisfactorily complete investigation of matters referred to him pursuant to these rules or filed with him pursuant to Rule II or Rule III of the Supreme Court Rules for the Government of the Judiciary. The compensation of the Disciplinary Counsel shall be fixed by the Supreme Court. The compensation of personnel employed by the Disciplinary Counsel,

including any Assistant Disciplinary Counsel, shall be fixed by Disciplinary Counsel, with the approval of the Supreme Court. The Supreme Court shall provide office facilities, furnishings, stationery, equipment and office supplies for the Disciplinary Counsel. Disciplinary Counsel shall file annually with the Supreme Court and the Board a report of the activities and expenses of his office.

(c) (i) Funding. Funds for the operation of the Board and offices created under this rule shall be provided from the registration fees collected pursuant to Rule VI of the Supreme Court Rules for the Government of the Bar of Ohio.

(ii) Budgets. The Board and Disciplinary Counsel shall file with the Supreme Court on or before November 1 of each year, a proposed budget for the calendar year beginning the next January 1, for approval by the Supreme Court. Such reports and budget shall become a part of the public records of the Supreme Court.

(d) *Public Records.* Except as provided in Section 23 of this rule and by state and federal law, documents, investigations of complaints made under these rules, and records of the Board of Commissioners, the Secretary, and the Disciplinary Counsel, including records of income and expenditures, shall be made available for inspection to any member of the general public at reasonable times during regular business hours. Upon request, a person responsible for such records shall make copies available at cost, within a reasonable period of time, and such records shall be maintained in such a

manner that they can be made available for inspection in accordance with this rule.

(4) **Referral for Investigation.** The Board of Commissioners may refer to a Certified Grievance Committee or to Disciplinary Counsel any matters filed with it for investigation, as hereinafter provided.

In the event that a Certified Grievance Committee determines in the course of a disciplinary investigation that the matters of alleged misconduct under investigation are sufficiently serious and complex as to require the assistance of the Disciplinary Counsel, the Chairman of the Certified Grievance Committee may direct a written request for assistance to the Disciplinary Counsel. The Disciplinary Counsel shall investigate all such matters referred to him and report the results of the investigation to the committee which requested it.

(5)(a) *Application of Rule; Authority and Duty of Bar Committees and Disciplinary Counsel.* From and after the effective date of this rule, all proceedings with regard to mental illness and complaints and grievances involving alleged misconduct by Justices, judges and by attorneys and counselors at law; all proceedings for the discipline of such Justices, judges and attorneys and counselors at law, persons under suspension, probation or disbarred from the practice of law; and all proceedings for the reinstatement as an attorney and counselor at law shall be brought, conducted and disposed of in accordance with the provisions of this rule. Disciplinary Counsel and any Certified Grievance Committee shall investigate any matter filed with it and may cause a complaint to be filed pursuant to this rule in cases where it finds probable

cause to believe that misconduct has occurred or that a condition of mental illness exists.

The investigation of complaints with regard to mental illness and complaints and grievances involving alleged misconduct by Justices, judges and attorneys and counselors at law shall be conducted by the Special Investigator, Disciplinary Counsel or a Certified Grievance Committee. A Certified Grievance Committee sponsored by one or more bar associations, or a bar association may provide, by its constitution, regulations, or rules, for the appointment of lay persons as members of a grievance committee, provided that the majority of such committee shall consist of attorneys at law admitted to the practice of law by the Supreme Court.

The investigation of complaints by Disciplinary Counsel or a Certified Grievance Committee shall be concluded within sixty (60) days from the date of the receipt of the complaint. A decision as to the disposition of such complaint shall be made within thirty (30) days thereafter. Extensions of time for completion of the investigation may be granted upon written request, and for good cause shown, by the Secretary of the Board of Commissioners. If the investigation is not completed within sixty (60) days from the date of filing the complaint and no written request has been made for an extension of time, the Secretary shall refer the matter either to Disciplinary Counsel or to a geographically appropriate Certified Grievance Committee. No extension of time shall be granted beyond one-hundred-fifty (150) days from the date of receipt of the complaint. If an extension of time has been granted, and an investigation by a Certified Grievance Committee or Disciplinary Counsel is not

completed within one-hundred-fifty (150) days from the date of filing the complaint, the Secretary shall then refer the matter either to a geographically appropriate Certified Grievance Committee or to Disciplinary Counsel, and the investigation shall be completed within an additional sixty (60) days.

The Chairman and Secretary of the Board may extend time limits in the event of pending litigation, appeals, unusually complex investigations, or time delays in obtaining evidence or testimony of witnesses, or for other good cause shown.

Time limits set forth in this rule are not jurisdictional and no complaint filed shall be dismissed unless it appears that there has been an unreasonable amount of delay and that the respondent's rights to have a fair hearing have been violated.

No investigation conducted by Disciplinary Counsel or a Certified Grievance Committee shall be completed, and no formal complaint shall be filed with the Board, without first giving the judge or attorney who is the subject of the complaint or investigation notice of each allegation and the opportunity to respond to each allegation.

If a Certified Grievance Committee or Disciplinary Counsel determines upon investigation of a complaint that the filing of a formal complaint with the Board of Commissioners is not warranted, the Complainant shall be notified in writing of that determination.

Each Certified Grievance Committee and Disciplinary Counsel shall file quarterly, by the fifteenth day of January, April, July, and October of each year, with the Board of Commissioners a report of the number of complaints made to the committee or to Disciplinary Counsel during the preceding quarter. The report shall specify the types of complaints filed, including commingling of funds, conviction of crime, failure to file income tax returns, failure to protect the interest of a client, soliciting, embezzlement, conversion, failure to account, excessive fees, mental illness and any other type of complaint not herein set forth. The report shall indicate the number of complaints filed, the number pending in each category and the number terminated by action of the committee or Disciplinary Counsel during the reporting period.

The name of the Chairman of the Certified Grievance Committee shall be reported in writing annually to the Board of Commissioners and to Disciplinary Counsel by the President of each bar association having a Certified Grievance Committee.

The Board of Commissioners, Disciplinary Counsel, and the President, Secretary or Chairman of a Certified Grievance Committee of any regularly organized bar association in the state may call upon any Justice, judge or attorney and counselor at law in the state to assist in any investigation or to testify in any hearing before the Board of Commissioners or any panel for which provision is made in this rule, as to any matter as to which he would not be bound to claim privilege as an attorney at law. No such Justice, judge or attorney and counselor at law shall

neglect or refuse so to assist in any such investigation or so to testify.

In the event that a Certified Grievance Committee or Disciplinary Counsel shall in the case of a disciplinary investigation as provided for in this rule seek determination of a procedural question, the President of a bar association with a Certified Grievance Committee or the Chairman of its Certified Grievance Committee or Disciplinary Counsel shall direct a written inquiry to the Chairman of the Board of Commissioners by filing it with the Secretary of the Board. Upon receipt of such written inquiry, the Chairman of the Board of Commissioners may refer the inquiry to a panel of three (3) members of the Board. The three-member panel shall be selected by the Secretary of the Board of Commissioners by lot. The written inquiry shall be documented with such facts, citations, statutory references and other written data that may be of assistance to make a determination of the matter presented. After the panel has completed its study of the problem presented, the panel shall make a written recommendation as to solution of the question. Upon receipt of such report and recommendation, the Chairman of the Board of Commissioners shall promptly convene the members of the Board who shall approve, reject, modify or otherwise dispose of the panel's recommendation. In the event that the question presented requires immediate attention for decision, the Chairman of the Board has the discretionary power to waive reference of the question to a panel, but shall submit the question or questions presented to the entire Board for its decision.

Grievance Committees certified under these rules may be reimbursed from the funds created by the registration fees collected, pursuant to Rule VI, for direct expenses incurred by such Certified Grievance Committees in performing the obligations imposed on them by these rules, which shall be limited to costs for depositions, transcripts, copies of documents, necessary travel expenses, and compensation of investigators authorized by the Board. There shall be no reimbursement for the cost of the time of other bar association personnel or attorneys in discharging these obligations. Reimbursement shall be made upon submission to the Secretary of the Board of Commissioners of proof of expenditures for the aforesaid purpose.

(b) *Cooperation with Board of Commissioners of the Clients' Security Fund.*

(i) Upon the receipt of any complaint which presents facts which may be the basis for an award from the Clients' Security Fund under Rule VIII of these rules, Disciplinary Counsel or any Certified Grievance Committee authorized to investigate complaints under this rule shall notify the Complainant of his potential right to an award from the fund and provide him with the forms necessary to initiate a claim with the Clients' Security Fund.

(ii) Disciplinary Counsel, any Certified Grievance Committee authorized to investigate complaints under this rule and the Board shall provide the Board of Commissioners of the

Clients' Security Fund with findings from investigations, complaints or any other records it requests in connection with an investigation under Rule VIII; provided however that the transmittal of confidential information may be delayed pending the termination of the disciplinary investigation or proceedings.

(6) **Definitions.**

(a) *Misconduct.* Misconduct shall mean any violation by a Justice, judge or an attorney of any provision of the oath of office taken upon admission to the practice of law in this state or any violation of the Code of Professional Responsibility or the Code of Judicial Conduct as adopted by the Supreme Court from time to time, disobedience of these rules or of the terms of an order imposing probation or a suspension from the practice of law, or the commission or conviction of a crime involving moral turpitude.

(b) *Mental Illness.* Mental illness shall mean the condition defined in R.C. 5122.01(A).

(c) *Certified Grievance Committee.* A Certified Grievance Committee shall be a duly constituted and organized committee of the Ohio State Bar Association or of one or more local bar associations of the State of Ohio, which association permits the membership of any attorney practicing within the geographic area intended to be served by that association without reference to the attorney's area of practice, special interest or other criteria. It shall be certified by the Board of Commissioners to be responsible for the investigation of

allegations of misconduct by judges or attorneys and mental illness affecting judges or attorneys and the initiation of complaints as a result thereof under the provisions of these rules upon designation by the bar association(s) and satisfaction of the following minimum standards:

(i) It maintains a full-time permanent office which is open during regular business hours and has a listed telephone.

(ii) It has a minimum of one (1) full-time staff person to process complaints received by the Grievance Committee.

(iii) The Grievance Committee itself consists of not less than fifteen (15) persons, and the committee meets at lest once every other month.

(iv) The Committee maintains permanent files and records of proceedings, and it is sufficiently funded by the sponsoring bar association(s) to perform the duties imposed upon it by these rules.

(v) The Grievance Committee procedures for the processing of grievances shall conform to standard rules promulgated by the Board of Commissioners.

(vi) The Grievance Committee shall file the report set forth in paragraph (5)(a) of this rule.

(d) *Probable Cause.* Probable cause shall mean that there is available substantial credible evidence that misconduct has been committed.

(7) **Manner of Discipline.** Any Justice, judge or attorney found guilty of misconduct shall be disciplined as follows:

(a) a permanent disbarment from the practice of law, or,

(b) suspension for an indefinite period from the practice of law subject only to reinstatement as hereinafter provided, or,

(c) suspension for a period of six (6) months to two (2) years from the practice of law, which suspension may be stayed in whole or in part, or,

(d) probation for such period of time and upon such conditions as the Supreme Court determines, but only in conjunction with a suspension ordered pursuant to Section 7(c) of this Rule, or

(e) a public reprimand.

(8) **Effect of Discipline; Enhancement.** (A) A person disbarred or a person who has voluntarily surrendered his license to practice shall never thereafter be readmitted to the practice of law in this State. Prior disciplinary offenses shall be considered as a factor that may justify an increase in the degree of discipline to be imposed for subsequent misconduct.

(9) **Indefinite Suspension from the Practice of Law for Conviction of a Felony.**

(a) Any Justice, judge or attorney admitted to the practice of law in the State of Ohio who is convicted in this state of a felony, or who is convicted of an equivalent offense under the laws of any other jurisdiction, shall be subject to an indefinite suspension.

(i) A certified copy of the judgment entry of conviction of a Justice, judge or an attorney of an offense defined in this rule shall be transmitted forthwith by the judge entering such judgment to the Secretary of the Board of Commissioners. A certified copy thereof shall also be transmitted forthwith to Disciplinary Counsel or the President, Secretary or Chairman of each Certified Grievance Committee.

(ii) Upon receipt from any source of a certified copy of the judgment entry of conviction by the Secretary of the Board of Commissioners, the Secretary shall promptly cause such entry to be submitted to the Supreme Court, whether the conviction resulted from a plea of guilty or a plea of nolo contendere or from a verdict after trial or otherwise, and regardless of the pendency of an appeal.

(iii) The Supreme Court may enter such order as it deems appropriate, including an order immediately and indefinitely suspending the Justice, judge or attorney from the practice of law.

(b) A certified copy of a judgment entry of conviction of an offense shall be conclusive evidence of the commission of that offense in any disciplinary proceedings instituted against a Justice, judge or an attorney based upon the conviction.

(c) Any disciplinary proceeding instituted against a Justice, judge or an attorney based upon a conviction of an offense shall not be brought to hearing until all appeals from the conviction are concluded.

(d) A Justice, judge or an attorney suspended under the provisions of this rule or Rule II of the Supreme Court Rules for the Government of the Judiciary shall be reinstated by the Supreme Court upon the filing with the Secretary of the Board of Commissioners of a certified copy of a judgment reversing the conviction of the crime. Such reinstatement shall not terminate any disciplinary proceeding then pending.

(e) *Duty of Clerk on Entering Order.* Upon the entry of an order indefinitely suspending a Justice, judge or an attorney for conviction of an offense, the Clerk of the Supreme Court shall mail certified copies thereof as provided in Section (22) of these rules.

(10) Probable Cause Panel; Creation; Duties; Request for Review.

(a) *Creation.* There is hereby created one or more probable cause panels, each composed of three (3) members of the Board, chosen by the Chairman of the Board, who shall designate one lawyer or judge member as Chairman.

(b) *Duties.* Probable cause panel shall review each investigation in which Disciplinary Counsel or a Certified Grievance Committee has determined that probable cause exists to file a formal complaint resulting from a person's alleged misconduct, other than an alleged violation of the terms of probation.

(i) Upon making a preliminary determination that probable cause exists for the filing of a formal complaint, Disciplinary Counsel or a Certified Grievance Committee shall forward to the Secretary a summary of the investigation together with a copy of the formal complaint. The Secretary shall refer the matter to a probable cause panel for review. The probable cause panel shall review the investigation and make an independent determination of whether probable cause exists for the filing of a formal complaint. The panel shall then issue an order certifying the formal complaint to the Board or dismissing the complaint and investigation. The panel's determination shall be sent to Disciplinary Counsel, to the appropriate Certified Grievance Committee, and to the Respondent by certified mail.

(ii) Within seven (7) days of receipt of the panel's decision to dismiss the complaint, Disciplinary Counsel or a Certified Grievance Committee may appeal the decision to the full Board by filing an appeal in writing with the Secretary of the Board. In such a case, the Board shall review the investigation and make an independent determination as to whether probable

cause exists for the filing of a formal complaint. The Board shall then issue an order certifying the formal complaint or dismissing it, and shall send a copy of its decision to the parties by certified mail. There shall be no appeal from such decision.

(c) *Request for Review.* A person making allegations under these Rules, who is dissatisfied with a determination by a Certified Grievance Committee not to file further proceedings, may secure a review of such determination by filing a written request with the Secretary of the Board within fourteen (14) days after the Complainant is notified of the determination. The Secretary shall thereupon refer a request for review of a determination made by a Certified Grievance Committee to Disciplinary Counsel. The review shall be promptly considered by Disciplinary Counsel and a decision made upon such review within thirty (30) days and the Complainant thereupon notified. Extensions of time for completion of the review may be granted, for good cause shown, by the Secretary. No further review or appeal by a Complainant shall be authorized. If the original determination is not affirmed, any further proceedings shall be handled by the entity conducting the review.

(11) **The Complaint; Where Filed; By Whom Signed.** A complaint shall mean a formal written complaint alleging misconduct or mental illness of one who shall be designated as the Respondent. Six (6) copies of all such complaints shall be filed in the office of the Secretary of the Board. Complaints filed by a Certified Grievance Committee shall not be accepted for filing unless signed by one or more members of the Bar of Ohio in good standing, who shall be counsel for the Relator,

and supported by a certificate in writing signed by the President, Secretary or Chairman of the Certified Grievance Committee, which Certified Grievance Committee shall be deemed the Realtor, certifying that said counsel are duly authorized to represent said Relator in the premises and have accepted the responsibility of prosecuting the complaint to conclusion. It shall constitute the authorization of such counsel to represent said Realtor in the premises as fully and completely as if designated and appointed by order of the Supreme Court of Ohio with all the privileges and immunities of an officer of such Court. The complaint may also, but need not, be signed by the person aggrieved.

Complaints filed by the Disciplinary Counsel shall be filed in the name of Disciplinary Counsel as Relator.

Upon the filing of a complaint with the Secretary of the Board, Relator shall forward a copy thereof to Disciplinary Counsel, to the Certified Grievance Committee of the Ohio State Bar Association, to the local bar association and to any Certified Grievance Committee serving the county or counties in which the Respondent resides and maintains his office and for the county from which the complaint arose.

(12) Duty of the Board Upon Filing of the Complaint.

(a) *Notice to Respondent*. The Secretary of the Board of Commissioners shall send a copy of the Complaint by certified mail to the Respondent with a notice requiring him to file, within twenty (20) days after the mailing of such notice, six (6) copies of his answer and

to serve copies thereof upon counsel of record named in the complaint. Extensions of the time for the filing of the answer may be granted, for good cause shown, by the Secretary of the Board of Commissioners.

(b) *Mental Illness Suspension.* After an answer has been filed or the time for answer has elapsed, if the complaint or answer alleges mental illness supported by a certified copy of a journal entry of a court of competent jurisdiction adjudicating mental illness, or if the Board finds existing mental illness after an examination provided in (c) hereof, the Board shall forthwith certify the complaint to the Supreme Court and the Supreme Court may suspend the Respondent from the practice of law.

(c) *Examination.* If the complaint or answer alleges existing mental illness unsupported by a journal entry of a court of competent jurisdiction or mental illness is otherwise placed in issue, the Board or panel may, on its own motion or on motion by either party, order a medical or psychiatric examination of Respondent by one or more physicians, designated by the Board or panel, whose findings shall be presented to the Board or panel as evidence and made available to both parties.

(d) *Duty of Clerk on Entering Order.* Upon the entry of an order suspending Respondent for mental illness, the Clerk of the Supreme Court shall mail certified copies thereof as provided in the first paragraph of Section (22)(a) and shall change the registration of Respondent to inactive status. No publication of such order shall be made but the order shall be a matter of public record.

(e) *Termination.* Any suspension under this section may be terminated on Respondent's application to the Board and a showing of removal of the cause for the suspension, which is certified by the Board to, and affirmed by, the Supreme Court.

(13) Hearing by Panel of Three Commissioners; Motion for Default.

(a) After Respondent's answer has been filed, a formal hearing shall be held, upon reasonable notice, by a panel of Commissioners appointed by the Secretary by lot who shall designate one (1) lawyer or judge member of such panel as Chairman of the panel. Such panel shall consist of three (3) Commissioners, no one of whom shall be a resident of the district from which such complaint originated, and no one of whom shall have been a member of the probable cause panel which reviewed the matter pursuant to Section (10)(b) of this rule. Not more than one (1) public member shall serve on any hearing panel. A majority of such panel shall constitute a quorum for all purposes. Requests for continuance may be granted by the Chairman of the panel for good cause shown.

(b) If no answer has been filed within twenty (20) days of the answer date set forth in the notice to Respondent of the filing of the complaint, or any extension thereto, the Relator shall make reasonable efforts to contact the Respondent.

A motion for default shall contain at least the following:

(I) A statement of the effort made to contact the Respondent and the result;

(II) Sworn or certified documentary prima facie evidence in support of the allegations made;

(III) Relator's recommendation for sanction;

(IV) A statement of any mitigating factors of which Relator is aware; and

(V) A certificate of service of the motion on Respondent at the address shown for Respondent on the records of the Supreme Court and at the last address known to Relator, if different.

A hearing panel may grant a motion for default by unanimous agreement only. If a motion is granted, the panel shall make its certified report for review by the Board, pursuant to Section (16) of this rule. If a motion is denied, the panel shall proceed with a formal hearing, pursuant to subsection (A) of this section. The Chairman of the Board may set aside a default entry, for good cause shown, and order a panel hearing at any time before the Board's report and recommendation are certified to the Supreme Court.

(14) **Authority of Panel; Dismissal.** If the panel finds that the complaint or evidence is insufficient to support a charge of misconduct the panel may order that the complaint be dismissed. Such action shall be reported to the Secretary of the Board of Commissioners who shall give written notice of the action taken to the Board of Commissioners, the Respondent, all counsel of record, Disciplinary Counsel, the Certified Grievance Committee for and the local bar association or associations of the county in which the Respondent resides and maintains his office and the county from which the complaint arose, and the Ohio State Bar Association.

(15) **Referral by Panel.** In the alternative, if the panel determines that findings of fact and recommendations for dismissal should be referred to the Board of Commissioners for review and action by the full Board, the panel may submit its findings of fact to the Board of Commissioners and may recommend dismissal in the same manner as provided in the following sections of this Rule V with respect to public reprimand, probation, suspension or disbarment.

(16) **Public Reprimand, Probation, Suspension or Permanent Disbarment; Duty of Panel.** If the panel finds and determines by clear and convincing evidence that Respondent is guilty of misconduct and that public reprimand, suspension for a period of six (6) months to two (2) years, probation, suspension for an indefinite period, or permanent disbarment is merited, the panel shall make its certified report of the proceedings before it, including its findings of fact and recommendations, and any recommendations as to probation and the terms thereof, and shall file the same, together with the

transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, with the Secretary of the Board.

(17) **Review by Entire Board.** Upon review, the Board may refer the matter back to the panel for further hearing or may order a further hearing to be presented before the Board or may proceed upon the certified report of the prior proceedings before the panel. Upon the final review, the Board may dismiss the complaint or find that the Respondent is guilty of misconduct. If the complaint is dismissed, such action shall be reported to the Secretary of the Board, who shall notify the same persons and organizations that would have received notice fit he complaint had been dismissed by the panel that heard the matter.

(18) **Public Reprimand; Probation, Suspension or Permanent Disbarment; Duty of Board after Review.** If the Board determines that a public reprimand, suspension for a period of six (6) months to two (2) years, suspension for an indefinite period from the practice of law, permanent disbarment or probation is merited, the Board shall thereupon make a final certified report of such proceedings, including its findings of fact and recommendations, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, in the office of the Clerk of the Supreme Court, and shall forthwith notify the Respondent and all counsel of record of such action, enclosing with such notice a copy of the findings of fact

and recommendations and a copy of the statement of the actual and necessary expenses incurred.

(19) Show Cause Order Issued by the Supreme Court to Respondent. On the filing of such final report of the Board, the Supreme Court shall issue to the Respondent an order to show cause why the report of the Board shall not be confirmed and a disciplinary order entered. Notice of the order to show cause shall be served by the Clerk of the Supreme Court on the Respondent and all counsel of record, personally or by certified mail.

(20) Response to Order to Show Cause and Objections. The Respondent or Relator within twenty (20) days after the issuance of an order to show cause may file objections to the findings or recommendations of the Board and to the entry of a disciplinary order or to the confirmation of the report on which the order to show cause was issued, and a brief in support of such objections, together with proof of service of copies thereon on the Secretary of the Board and on all counsel of record. All objections and briefs shall be filed in the number and form required by rules of the Supreme Court for original actions.

(21) Answer Briefs. Answer briefs together with proof of service shall be filed within fifteen (15) days after briefs in support of objections have been filed. All briefs shall be filed in the number and form required by the rules of the Supreme Court for original actions.

(22) Review by Court; Reimbursement for Expenses of Board; Duty of Clerk on Entering Order; Duties of Disqualified or Resigned Attorney.

(a) After hearing on objections, or, if objections are not filed within the prescribed time, the Supreme Court shall enter such order as it may find proper, which may include provision for reimbursement of costs and expenses incurred by the Board or panels. An order imposing a suspension for an indefinite period or for a period of six (6) months to two (2) years may allow full or partial credit for any period of suspension imposed under Section (9) of this rule. Upon the entry of any disciplinary order pursuant to this rule, or acceptance of a resignation from the practice of law, the Clerk of the Supreme Court shall mail certified copies thereof to counsel of record, to the Board of Commissioners, to Respondent (at his last known address), to the Disciplinary Counsel, to the Certified Grievance Committee for and the local bar association or associations in the county or counties in which the Respondent resides and maintains his office and the county or counties from which the complaint arose, to the Ohio State Bar Association, to the Administrative Judge of the Court of Common Pleas for each such county or counties, and to the Presiding Judges of the United States District Courts in Ohio, the United States Court of Appeals for the Sixth Circuit and to the Supreme Court of the United States.

If a disciplinary order of the Supreme Court provides for a disbarment, suspension, public reprimand, probation, or acceptance of a resignation from the practice of law, the Clerk of the Supreme Court shall

arrange for publication thereof in the official reports of the Supreme Court, in the Ohio State Bar Association Report of the Ohio State Bar Association and in a publication, if any, of the local bar association. Such publication shall include a citation of the case in which the disciplinary order was issued.

If any attorney resigns from the practice of law, the Clerk of the Supreme Court shall arrange for publication of the order of the Supreme Court in the Ohio State Bar Association Report of the Ohio State Bar Association, in a publication, if any, of the local bar association, and by the publisher of the official reports of the Supreme Court.

(b) The Supreme Court shall include in its order disbarring or suspending, for mental illness or disciplinary reasons, an attorney, or in any order pertaining to the resignation of an attorney, a time limit not to exceed thirty (30) days, within which the disqualified attorney shall:

(i) Notify all clients being represented in pending matters and any co-counsel of his disbarment, suspension or resignation and his consequent disqualification to act as an attorney after the effective date of such order, and, in the absence of co-counsel, also notify the clients to seek legal service elsewhere, calling attention to any urgency in seeking the substitution of another attorney in his place;

(ii) Regardless of any fees or expenses due the attorney, deliver to all clients being represented in pending matters any papers or other

property pertaining to the client, or notify the clients or co-counsel, if any, of a suitable time and place where the papers or other property may be obtained, calling attention to any urgency for obtaining such papers or other property;

(iii) Refund any part of any fees or expenses paid in advance that are unearned or not paid, and account for any trust money or property in his possession or control;

(iv) Notify opposing counsel in pending litigation or, in the absence of counsel, the adverse parties, of his disqualification or resignation to act as an attorney after the effective date of such disqualification order, and file a notice of disqualification of counsel with the Supreme Court or agency before which the litigation is pending for inclusion in the respective file or files;

(v) All notices required by such an order of the Supreme Court shall be by certified mail and shall contain a return address where communications may thereafter be directed to the disqualified attorney;

(vi) Within the time limit prescribed by the Supreme Court the disqualified attorney shall file with the Clerk of the Supreme Court and the Disciplinary Counsel an affidavit showing compliance with the order entered pursuant to this rule and proof of service of notices required by said order. Such affidavit shall also set forth the address where the affiant may receive

communications, and said offices shall be kept advised of any later change in address by the disqualified attorney;

(vii) A disqualified attorney shall retain and maintain a record of the various steps taken by him pursuant to the order entered by the Supreme Court so that, upon any subsequent proceeding instituted by or against him, proof of compliance with the order will be available for receipt in evidence.

(c) Whenever an attorney is suspended for mental illness, cannot be found in the jurisdiction for a period of sixty (60) days or more, dies, refuses to meet or work with a significant number of clients for a period of sixty (60) days or more, or fails to comply with paragraph (b) of this section, and no partner, executor or other responsible party capable of conducting the attorney's affairs is available and willing to assume appropriate responsibility the Disciplinary Counsel or Chairman of a Certified Grievance Committee may appoint an attorney or attorneys to inventory to files of such attorney and to take such action, including action set forth in paragraph (b) herein, as is necessary to protect the interest of clients of such attorney. Upon approval by the Secretary of the Board, reasonable fees may be paid to such appointed attorney or attorneys from the registration fees collected pursuant to Rule VI of the Supreme Court Rules for the Government of the Bar. An attorney so appointed shall not, except as necessary to carry out the order of appointment by the Disciplinary Counsel or Chairman of a Certified Grievance Committee may appoint an attorney or attorneys to inventory the files

of such attorney and to take such action, including action set forth in paragraph (b) herein, as is necessary to protect the interest of clients of such attorney. Upon approval by the Secretary of the Board, reasonable fees may be paid to such appointed attorney or attorneys from the registration fees collected pursuant to Rule VI of the Supreme Court Rules for the Government of the Bar. An attorney so appointed by the Disciplinary Counsel or Chairman of a Certified Grievance Committee, disclose any information contained in files so inventoried without the written consent of the client to whom such files relate. Such attorney may not represent that client.

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(31) **Manner of Service.** Whenever provision is made for the service of any notice, order, report or other paper or copy thereof upon any Complainant, Relator, Respondent, Petitioner, or other party, in connection with any proceeding under these rules, service may be made upon counsel of record for such Complainant, Relator, Respondent, Petitioner, or other party, either personally or by certified mail.

(32) **Quorum of Panel or Board.** A majority of the members of the Board of Commissioners, or a panel thereof, shall constitute a quorum for all purposes and the action of a majority of those present comprising such quorum shall be the action of the Board of Commissioners or a panel thereof; except for the granting of a motion for default pursuant to Section (13)(B) of this rule, which shall require the unanimous action of a hearing panel.

(33) Clerk is Agent for Service of Notices on Nonresident Justice, Judge or Attorney. Any nonresident of this state, having been admitted as an attorney and counselor at law by the rules of the Supreme Court, or any resident of this state, having been admitted as an attorney and counselor at law by the rules of the Supreme Court, who subsequently becomes a nonresident or conceals his whereabouts, by such admission to the practice of law within this state makes the Clerk of the Supreme Court his agent for the service of any notice provided for in any proceeding instituted against such Justice, judge, or attorney and counsel at law, pursuant to this rule.

(34) Manner of Service on Clerk; Record of Such Service a Public Record. All such notices shall be served by the Secretary of the Board upon the Clerk a true and attested copy of such notice and any accompanying document and by sending to the Respondent, by certified mail, postage prepaid, return receipt requested, a like, true and attested copy, with an endorsement thereon of the service, upon said Clerk of the Supreme Court, addressed to such Respondent at his last known address. The receipt indicating the certified mail number shall be attached to and made a part of the return of service of such notice by the Secretary. The panel or Board or Court before which there is pending any proceeding in which notice has been given as provided in this section may order such continuance as is necessary to afford the Respondent reasonable opportunity to appear and defend. The Clerk of the Supreme Court shall keep a record of the day and hour of service upon him of such notice and any accompanying document, which shall be a public record in the office of said Clerk.

(35) **Power to Issue Subpoenas.** In investigations and proceedings under this rule, upon application by Disciplinary Counsel, the President, Secretary, or Chairman of a Certified Grievance Committee authorized to sign a certificate under Section (11) hereof, the Special Investigator, or the Respondent or Relator, each member of the Board of Commissioners and its Secretary shall have power to issue subpoenas and to cause testimony to be taken under oath before the Special Investigator, Disciplinary Counsel, a Certified Grievance Committee or a hearing panel of the Board of Commissioners. All such subpoenas shall be signed by a member of the Board or its Secretary and served as provided by statute.

(36) **May Order Depositions.** The Secretary of the Board may order testimony of a witness to be taken by deposition within or without this state in the manner prescribed for the taking of depositions in civil actions, and such depositions may be used to the same extent as permitted in civil actions.

(37) **Discovery Limited.** For sixty (60) days following the filing of an answer in formal proceedings, both Relator and Respondent shall be afforded reciprocal discovery of all matters not privileged.

Disputes concerning the scope and other aspects of discovery shall be determined by the Chairman of the hearing panel before which the matter is pending. All discovery orders by the Chairman are interlocutory and may not be appealed prior to the entry of the final order.

(38) **Effect of Refusal to Testify.** The refusal or neglect of the person subpoenaed as a witness to obey a

subpoena, to attend, to be sworn or to affirm, or to answer any proper question shall be deemed to be contempt of the Supreme Court and shall be punishable accordingly.

(39) Rules of Evidence. All rules of evidence shall be observed in the conduct of all hearings, and the Respondent may be represented by counsel, who shall enter formal appearance.

(40) Docket of Complaints. The Secretary of the Board shall keep a docket of each complaint and of all proceedings thereon, which shall be retained permanently as a part of the record of his office.

(41) Board May Prescribe Rules. The Board may, subject to the prior approval of the Supreme Court, adopt other rules and regulations not inconsistent herewith.

(42) Rule to be Liberally Construed. The process and procedure under this rule and other regulations approved by the Supreme Court shall be as summary as reasonably may be. Amendments to any complaint, notice, answer, objections, report or order to show cause may be made at any time prior to final order of the Supreme Court. The party affected by such amendment shall be given reasonable opportunity to meet any new matter presented thereby. No investigation or procedure shall be held to be invalid by reason of any nonprejudicial irregularity or for any error not resulting in a miscarriage of justice. This rule and such regulations relating to investigation and proceedings involving complaints of misconduct and petitions for reinstatement

shall be liberally construed for the protection of the public, the courts and the legal profession and shall apply to all pending investigations and complaints so far as may be practicable, and to all future investigations, complaints and petitions whether the conduct involved occurred prior or subsequent to the amendment of this rule. To the extent that application of this amended rule to such pending proceedings may not be practicable, the rules and regulations in force at the time this amended rule became effective shall continue to apply.

(43) Proceedings Private; Public.

(a) All proceedings and documents relating to review and investigation of complaints made under these Rules shall be private except:

(i) where Respondent shall request in writing that they be public; or

(ii) where Respondent by voluntary act waives privacy of the proceedings.

(b) At the time a formal written complaint is certified by a probable cause panel to the Secretary of the Board, that formal complaint, and all subsequent proceedings in connection therewith, shall be public.

(c) All members of the Board, or of any Certified Grievance Committee, shall be required, prior to taking office, to swear or affirm that they will abide by these rules and further that they will protect the privacy of the proceedings and documents relating thereto.